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No. 83-

In The

Supreme Court of the United States

October Term, 1983

WILBUR WERLING, CARL DRIESSNACK,
LOREN SAAR, and HENRY EICKELBERG, individually,
and on behalf of all similarly situated voting members of
GRACE EVANGELICAL LUTHERAN CHURCH
OF RIVER FOREST, ILLINOIS

Petitioners,

vs.

GRACE EVANGELICAL LUTHERAN CHURCH
OF RIVER FOREST, ILLINOIS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST DISTRICT
(ILLINOIS APPELLATE COURT NUMBER 81-1851)

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QUESTIONS PRESENTED

1. Whether, in deciding questions governing and pertaining to the polity of a church body, a civil court is bound by the First and Fourteenth Amendments of the Constitution of the United States to defer to that church body's resolution of those questions.

2. Whether it is constitutionally permissible for a civil court to overrule a church body's own determination of its polity, when that determination is supported by an affidavit and resolution from that church body, as well as the constitution, bylaws and other neutral documents of that church body.

LIST OF PARTIES

Petitioners Wilbur Werling, Carl Driessnack, Loren Saar, and Henry Eickelberg were the appellants in the proceedings below before the Appellate Court of Illinois. Respondent Grace Evangelical Lutheran Church of River Forest, Illinois, was the appellee/cross-appellant in the court below. The Lutheran Church-Missouri Synod and Concordia Teachers College, who are not parties to this Petition, were also appellants in the court below.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioners Wilbur Werling, Loren Saar, Henry Eickelberg and Carl Driessnack, individually and on behalf of all similarly situated voting members of Grace Evangelical Lutheran Church of River Forest, Illinois, respectfully request that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, entered on September 8, 1983 (No. 81-1851).

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, which is reproduced in the Appendix beginning at page A-1, is reported at 118 Ill.App.3d 151, 454 N.E.2d 1038 (1st Dist. 1983).

JURISDICTION

The judgment of the Appellate Court of Illinois, reproduced in the Appendix beginning at page A-1, was entered on September 8, 1983. The Order of the Appellate Court of Illinois denying Petitioners' timely petition for a rehearing was entered on October 17, 1983. The Illinois Supreme Court denied Petitioners' timely petition for leave to appeal on January 31, 1984. The order of the Illinois Supreme Court denying Petitioners leave to appeal is reproduced in the Appendix at page B-1. This Petition was filed within 90 days of the date that the Illinois Supreme Court denied the petition for leave to appeal. The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation of those portions of the First and Fourteenth Amendments of the Constitution of the United States of America pertaining to the relationship between church and state. The texts of each of these constitutional provisions are set forth in the Appendix beginning at page C-1.

STATEMENT OF THE CASE

Introduction:

This case involves a dispute between two groups within a local church, Grace Evangelical Lutheran Church of River Forest, Illinois ("Grace Church") and its relationship to a larger church organization, the Lutheran Church—Missouri Synod (the "Synod"). The majority of the members of Grace Church decided to leave the Synod, and to take control of the church and attendant property. The highest ecclesiastical tribunal within the Synod ruled that the majority of Grace Church did not have the right to do so and awarded the church to the minority members, who are the instant Petitioners. Civil courts have refused, and have, in fact, reversed the Synod's decision and have allowed the majority of Grace

Church to keep control of the church. Petitioners submit the failure of the civil courts to enforce the Synod's decision violates the First and Fourteenth Amendments of the United States Constitution.

The Parties:

Petitioners Wilbur Werling, Loren Saar, Henry Eickelberg and Carl Driessnack ("Petitioners") are voting members of Grace Church. Until recently Grace Church was a member of the Synod, an organization consisting of Lutheran churches, teachers and pastors. The Synod is the second largest Lutheran church body in North America. Grace Church was a member of the Synod for seventy-five years until a majority of the members of Grace Church voted to withdraw from the Synod in September, 1977. Petitioners represent all of those voting members of Grace Church who opposed Grace Church's decision to withdraw from the Synod and contended that it violated the Synod's rules and was contrary to the Synod's religious doctrine.

The objectives and purposes of the Synod are to unite the members of the Evangelical Lutheran Church into a corporate body, to train and exercise supervision over the teachers and pastors of those congregations affiliated with the Synod with respect to doctrine, practice and the performance of official duties, and to promote the unity of the faith and a defense against schism [Articles of Incorporation of the Lutheran Church-Missouri Synod ("Articles of Incorporation"), Article II; Constitution of the Lutheran Church-Missouri Synod ("Constitution"), Article III].

While the Synod permits a certain amount of self-government by its member congregations in those matters which do not affect the Synod as a whole, the autonomy of the Synod's member congregations is severely limited by the Synod's requirement that all members accept certain prescribed religious tenets and doctrine; use only doctrinally pure agenda, hymn books and catechisms; submit their constitutions for examination and approval by the Synod; and call

only those pastors and teachers who have been admitted to their respective ministries and teaching positions in accordance with the Synod's rules and regulations (Constitution, Article VI; Bylaws of the Lutheran Church—Missouri Synod ("Bylaws") 1.05, 4.01).

The Synod, pursuant to its rules and regulations, is empowered to expel from membership any of its pastors and teachers who adhere to or teach false doctrine as that is determined by the Synod (Constitution, Articles XII, XIII). The Synod may also expel any member who violates one of the Synod's various religious tenets, or whose actions are contrary to the conditions of membership that the Synod has established in its constitution and bylaws (Constitution, Article XIII). Additionally, the Synod has the right to adopt resolutions and statements to settle all controversies over the interpretation of its doctrine. Such resolutions and statements must be honored and upheld until the Synod amends or repeals them (Bylaw, 1.02).

The Synod has an elaborate judicial system to enforce the measures outlined above and the other rules and regulations that it has established, as well as to settle disputes between its members without the aid of civil courts. This adjudicatory process is hierarchical in that it includes both lower courts and courts of review by which a member can appeal any decision rendered by one of the Synod's tribunals (Bylaw, 5.01). As structured, the adjudicatory system of the Synod provides for a Synodical Commission of Adjudication ("Synodical Commission") which has jurisdiction over all disputes to which the Synod is a party (Bylaw, 5.25). Further, each district in the Synod has its own District Commission of Adjudication which is the forum created by the Synod to settle disputes between members of the same synodical district or between a member congregation and its synodical district (Bylaws, 5.21, 5.22).

Any decision rendered by a District Commission of Adjudication may be appealed to the Synodical Commission (Bylaw, 5.07). However, if the congregation does not alter its

course of conduct or appeal a decision rendered against it by the District Commission of Adjudication, the synodical district is empowered to "take such action with respect to such congregation as it may deem necessary," including the expulsion or suspension of that congregation from membership in the Synod (Constitution, Article XIII; Bylaw 5.07).

The 1929 Agreement:

Although Grace Church joined the Synod in 1902, the relationship between Grace Church, the Synod, and the Synod's teacher training college, Concordia Teachers College ("Concordia") was bonded in a formal sense in 1929 when Grace Church purchased the property upon which it is located (the "Church Property") from the Synod. The Synod permitted this sale so that there would always be a synodical church on the Church Property. To assure that there would always be a synodical church on the Church Property, the property was conveyed to Grace Church pursuant to an agreement ("1929 Agreement") which contained an option clause granting the Synod and Concordia the right to repurchase the Church Property from Grace Church if Grace Church ever became affiliated with another church, or upon the occurrence of various other circumstances, including the following:

- c. Whenever said first party (Grace Church) shall fail or decide to not teach and preach the scriptures as set forth under Article II entitled "Confession" of the Constitution of said Missouri Synod and in accordance with the rules, regulations and customs of said second party (the Synod).

The 1929 Agreement was expressly acknowledged by the parties to be part of the consideration for the Synod's sale of the Church Property to Grace Church.

Grace Church's Decision To Withdraw From The Synod:

Grace Church, the Synod and Concordia continued to cultivate and develop a close relationship over the next several decades. Until the early 1970's, Grace Church apparently

had no problem living within the confines of the 1929 Agreement or the Synod's rules and regulations. However, in the early 1970's, the Synod's history of being theologically conservative and of maintaining hierarchical control over the interpretation of its doctrine, its pastors, and its teachers, resulted in growing conflicts with certain of the Synod's more liberal member churches, including Grace Church.

This escalating conflict was intensified at the Synod's New Orleans Convention in 1973, where the Synod, in unambiguous terms, once again manifested its intent to be the final arbiter of all doctrinal disputes (pursuant to its rules and regulations) and once again held that its doctrinal positions were binding on its member churches, pastors and teachers.

The friction within the Synod was further increased when on April 6, 1976, the Synod, pursuant to its rules and regulations, removed four district presidents from their offices for failing to adhere to certain synodical positions pertaining to the ordination of pastors. At that time, one of the Synod's teachers was also tried by the Synod for teaching false doctrine. The Synod's display of theological conservatism further upset some of Grace Church's leadership.

On September 20, 1977, following a recommendation by Grace Church's Church Council, a majority of Grace Church's voting members voted to withdraw from the Synod, effective October 1, 1977. On October 1, 1977, the Synod and Concordia exercised their option to purchase the Church Property pursuant to the 1929 Agreement. On October 28, 1977, Grace Church instituted the instant action in the trial Court against Concordia and the Synod. Petitioners subsequently intervened in that lawsuit.

The Synod's Adjudications:

In an effort to resolve its dispute with Grace Church through the Synod's ecclesiastical adjudicatory system, the Synod filed an action with the Synodical Commission of Adjudication on February 17, 1978. On April 14, 1978, Grace

Church declined to participate in that adjudication. After hearing arguments in the case, the Synodical Commission of Adjudication rendered a decision on June 12, 1978, concluding that Grace Church violated the rules and regulations of the Synod in several respects.

Since the Synodical Commission of Adjudication's decision of June 12, 1978, did not directly address their rights, Petitioners instituted a separate action against Grace Church and those voting members of Grace Church who voted to withdraw from the Synod with the District Commission of Adjudication of the Northern Illinois District. On August 7, 1978, ("August, 1978, Decision"), the District Commission found that those members of Grace Church who voted to disaffiliate from the Synod violated certain scriptural provisions as well as the rules and regulations of the Synod.

On April 30, 1979, ("April, 1979, Decision"), at Petitioners' request, the District Commission issued an addendum to its August 7, 1978, Decision. The April, 1979, Decision is reproduced in the Appendix beginning at page D-1. The April, 1979, Decision directly adjudicated the rights of Petitioners with respect to the Church Property and concluded that the majority members of Grace Church had caused a schism within the church by voting to withdraw from the Synod; that the District Commission's August 7, 1978, Decision that Grace Church had violated certain Synod rules and scriptures was restricted in its application to those members of Grace Church who voted to withdraw from the Synod; and that Petitioners were the beneficiaries of and entitled to the Church Property and its attendant benefits. The District Commission based its decision on the terms of Grace Church's own Constitution:

(Petitioners) are thereby entitled to the benefits and protection of the Constitution and Bylaws of the Grace Lutheran Church, including Article XV SCHISM, which reads: If at any time a schism should take place in the congregation which God may graciously prevent,

the property of the congregation and all benefits connected therewith shall remain with those members who shall adhere to unalterable articles of this Constitution mentioned in Article XVI. (Appendix, D-2.)

By its decision, the District Commission determined that Petitioners and those persons who they represented were, in essence, the true Grace Church and the beneficiaries of all of the benefits resulting from that status, including ownership of the Church Property.

Decisions Of The Courts Below

In the trial court, Petitioners raised the constitutional questions presented in this Petition when they filed a motion for summary judgment requesting that the trial court adopt the findings of, and consider itself bound by, the April, 1979, Decision. Petitioners contended that the Synod was a hierarchical church and, accordingly, consistent with both the Constitution of the United States and the decisions of this Court interpreting the Constitution, the trial court was bound to defer to the highest ecclesiastical tribunal of the Synod and to simply enforce the April, 1979, Decision. The trial court denied Petitioners' motion, and instead, granted summary judgment to Grace Church on Petitioners' Complaint. The trial court also found that the 1929 Agreement was valid and legally binding but refused to enforce the exercise of the option to repurchase the Church Property because paragraph 1(c) of the 1929 Agreement under which the Synod and Concordia elected to proceed was not enforceable in a civil court as applied to the facts of this case. The trial court's opinion and judgment is reproduced in the Appendix beginning at page E-1.

The Appellate Court of Illinois affirmed the trial court's decision in all respects in its opinion of September 8, 1983. (Appendix, beginning at A-1.) In doing so, the Appellate Court also addressed the various constitutional issues raised by Petitioners.

The Appellate Court of Illinois conceded that civil courts must defer to resolutions of religious disputes rendered by the highest authority within a hierarchical church organization (Appendix at page A-7). The Appellate Court also noted that it was appropriate to determine the polity of a church organization (Appendix at page A-14). The Appellate Court then reviewed the various constitutional provisions and bylaws of the Synod as well as an Affidavit submitted by the Synod stating that its own polity was hierarchical (Appendix at page A-19). However, the Appellate Court also looked at certain religious documents provided to it by Grace Church and concluded that upon "review of such conflicting evidence and voluminous documents contained in the record we have found that we cannot constitutionally make the extensive inquiry and evaluation necessary to determine the polity of the Synod with respect to doctrinal disputes" (Appendix at page A-20).

The Appellate Court of Illinois denied Petitioners' Petition For Rehearing on October 17, 1983, and the Illinois Supreme Court denied Petitioners' petition for leave to appeal on January 31, 1984.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S FAILURE TO GIVE CREDENCE TO THE SYNOD'S OWN DETERMINATION OF ITS POLITY SIGNIFICANTLY NARROWS THE SCOPE OF PROTECTION AFFORDED RELIGIOUS INSTITUTIONS BY THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES

This case presents issues of paramount importance pertaining to the separation of church and state and arising under the First and Fourteenth Amendments of the Constitution of the United States. The Appellate Court's decision below significantly restricts the autonomy of religious institutions previously guaranteed by this Court's interpretation of the First and Fourteenth Amendments and, holds for the first

time, that a civil court can substitute its own determination as to the issues governing the polity of a church in place of that church's determination, even if that determination is readily ascertainable and supported by neutral, non-religious evidence. Petitioners contend that the April, 1979, Decision entered by the Synod's religious tribunal is binding on civil courts because the decision represents the adjudication of a doctrinal dispute between members of the Synod by the highest ecclesiastical tribunal within the Synod.

As the Appellate Court correctly noted in its opinion, civil courts are constitutionally bound by decisions rendered by the highest ecclesiastical tribunal of a hierarchical church and civil courts must wholly defer to these decisions (Appendix at page A-16); *Jones v. Wolf*, 443 U.S. 595 [1979]; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 [1976] ("Serbian".) The reason for compelling civil courts to honor such ecclesiastical decisions was made clear by this Court in *Presbyterian Church v. Blue Hull Church*, 393 U.S. 440 (1969):

All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. *But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed.* It is of the essence of these religious unions, and their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. 393 U.S. at 446. (Emphasis Added.)

This Court has also delineated certain guidelines to assist civil courts in making the threshold determination as to whether a church body is hierarchical or congregational. In determining whether a church has a hierarchical polity or has another type of polity, civil courts have recognized two

general types of religious bodies or organizations: congregational churches and hierarchical churches. With respect to those churches that are hierarchical in nature, its ecclesiastical decisions are binding on civil courts. This Court has previously defined hierarchical churches as "those organized as a common ruling, convocation or ecclesiastical head." *Kedroff v. St. Nicholas Church*, 344 U.S. 94, 100 (1952). In contrast, a congregational church has been defined by this Court to be a church which "by the nature of its organization is *strictly independent* of other ecclesiastical associations, and so far as church government is concerned, *owes no fealty or obligation to any higher authority*." (Emphasis added.) *Watson v. Jones*, 80 U.S. 679, 722 (1871). Courts have also recognized that a church can be both hierarchical in some respects and congregational in others, *Kelley v. Riverside Blvd. Independent Church of God*, 44 Ill.App.3d 673, 358 N.E.2d 696, 704 (2d Dist. 1976) ("*Kelley*").

Based on these general principles, the Appellate Court was constitutionally bound to follow and adopt the April, 1979, Decision if the Synod is hierarchical in matters pertaining to the enforcement and interpretation of its own doctrine.

While the Appellate Court correctly recognized that it was bound by the decision of a properly convened tribunal of a hierarchical church, the Appellate Court departed from this Court's previous rulings by refusing to follow the Synod's own determination of its polity and instead, substituted its own determination as to that polity.

The Synod has evidenced its hierarchical polity in a number of ways. First, the Synod, through the Affidavit of its highest ranking constitutional official, Dr. Herbert Mueller, stated that it was hierarchical in doctrinal issues and in the adjudication of doctrinal disputes:

Simply stated, the Synod regards its member congregations as having voluntarily relinquished a portion of their autonomy by association with other member congregations within the Synod, especially in doctrinal

matters, and procedures involving the adjudication and appeal of doctrinal issues, and its own rules, regulations, customs and policies. In this respect, the Synod regard itself as having a 'hierarchical' character, as that has been articulated in some civil courts. (Dr. Mueller's Affidavit is reproduced in the Appendix beginning at page F-1.)

This Affidavit is the official position of the Synod by virtue of the decision of its Committee on Constitutional Matters which resolved to "ratify and endorse" Dr. Mueller's Affidavit.

Further, the Appellate Court refused to allow Petitioners to amend the record before it to include a resolution passed by the Synod shortly before the issuance of the Appellate Court's Opinion, in which the Synod resolved it is and had been "hierarchical" with respect to "agreements to abide by adjudicatory procedures in their final determinations..." (Resolution 5-10A is reproduced in the Appendix beginning at page G-1.)

Although Dr. Mueller's Affidavit and the Synod's Resolution are dispositive of the issue, it was not necessary for the Appellate Court to rely solely on that evidence to find that the Synod's polity is hierarchical. The Appellate Court also could have examined the Synod's neutral documents to determine its polity (i.e., the Synod's bylaws and constitution). This Court has made it clear that a review by a civil court of a church's bylaws and constitution is permissible. *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian*, 426 U.S. 696 (1976); *Presbyterian Church v. Blue Hull Church*, 393 U.S. 440 (1969). Without such a threshold inquiry, it would be virtually impossible for a civil court to ever determine the polity of any church. A review of certain neutral documents of the Synod, including its bylaws and constitution, clearly demonstrates that the Synod is hierarchical with respect to doctrinal matters and the adjudication of doctrinal disputes between its members.

The neutral documents of the Synod evidence that its members must adhere to certain religious tenets and beliefs or face expulsion from the organization (Constitution, Article XIII; Bylaw, 1.01). The Synod also establishes certain specific conditions for membership to which all members must adhere or forfeit their membership rights (Constitution, Article VI). These examples clearly illustrate that member congregations of the Synod are not wholly autonomous in matters of doctrine. Further, a fact found to be significantly hierarchical by the court in *Kelley*, that the mother church was empowered to appoint pastors for its member churches, is also evident here. *Kelley*, 358 N.E.2d at 696. The Synod specifically requires, upon penalty of expulsion (as did the church in *Kelley*), that its members appoint *only* those pastors who meet its doctrinal standards and who are ordained through the Synod's established procedure:

Congregations which are members of the Synod shall call and be served by pastors and call teachers who have been admitted to these respective ministries in accordance with the rules and regulations set forth in the Synodical Handbook. Congregations that violate this requirement forfeit their membership in the Synod. (Bylaw, 4.01.)

The neutral documents of the Synod also reveal that the Synod has an elaborate hierarchical adjudicatory system (Bylaws, Article V). This adjudicatory system is similar to the hierarchical judicial system encountered by this Court in *Serbian* and is designed to settle all disputes between members of the Synod without interference by civil courts. The system provides for a Synodical Commission which has jurisdiction over all disputes to which the Synod is a party (Bylaw, 5.25) and a District Commission to settle disputes within the districts (Bylaw, 5.29). This complex and elaborate system is designed to prevent civil courts from determining religious issues, and is manifestly hierarchical.

The Appellate Court refused to give credence to either Dr. Mueller's Affidavit, the Synod's Resolution, or the neutral

documents which evidence the hierarchical nature of the Synod. Ironically, by failing to do so, simply because Grace Church controverted the Synod's position in this litigation, the Appellate Court was guilty of the same impermissible excursion into the religious matters that it sought to avoid. This is precisely the mistake that was previously corrected by this Court in *Serbian*. In *Serbian*, this Court overruled the Illinois Supreme Court when the Illinois Supreme Court rendered its own judgment as to the propriety of the church's decision in place of the decision rendered by the Serbian Orthodox Church:

The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and *impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes*. Consistently with the First and Fourteenth Amendments 'civil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes] . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.' [citation omitted] For where resolution of the disputes cannot be made without extensive inquiry by civil courts into the religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them. (Emphasis Added.) 426 U.S. at 708-709.

Here the Appellate Court fell prey to Grace Church's strategy of overwhelming the Appellate Court by submitting a plethora of religious doctrine to the Appellate Court. As Grace Church hoped, the Appellate Court threw up its hands and concluded that to decide *anything* would be an excursion into religious matters since Grace Church was controverting the Synod's views on the Synod's polity. Thus, the Appellate Court substituted its own determination in place of the Synod's determination of its polity by failing to accept the Synod's decision, as it is reflected in Dr. Mueller's Affidavit, the Synod's Resolution and in the Synod's neutral documents, merely because Grace Church has said that the Synod was wrong in stating its polity. In other words, the Appellate Court concluded that the Synod was incorrect in declaring that it is a hierarchical church. This approach to the resolution of religious disputes is in direct conflict with the previous mandate of this Court and constitutes a violation of the constitutional provisions applicable to the separation of church and state. If the Appellate Court's decision is allowed to stand, the autonomy of churches in functioning without state control will be restricted in an unprecedented manner.

II. THE APPELLATE COURT'S DECISION WILL ENCOURAGE DISENCHANTED MEMBER CHURCHES TO LITIGATE RELIGIOUS DISPUTES IN CIVIL COURTS

The decision of the Appellate Court to plunge civil courts headlong into religious disputes will result in the resolution of numerous religious controversies by civil courts. The Appellate Court's holding is such that a local church can simply ignore any decision of an obviously hierarchical church when that decision is unfavorable simply by arguing that the church is not really hierarchical. According to the Appellate Court's decision, by merely submitting an affidavit to that effect, there would be "conflicting evidence" which would render a civil court impotent to address the issue.

Such an interpretation of the law conflicts with this Court's previous cases and undercuts the very protection afforded by those decisions and by the United States Constitution.

Further, if allowed to stand, the Appellate Court's decision would open the floodgates and would entangle civil courts in the resolution of numerous religious disputes. Such a decision would, as this Court previously stated, "lead to the total subversion of such religious bodies. . ." *Presbyterian Church v. Blue Hull Church*, 393 U.S. 440 (1969).

CONCLUSION

The Appellate Court of Illinois has erroneously decided important questions of federal law arising under the United States Constitution which should be reviewed and settled by this Court. Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois.

Respectively submitted,

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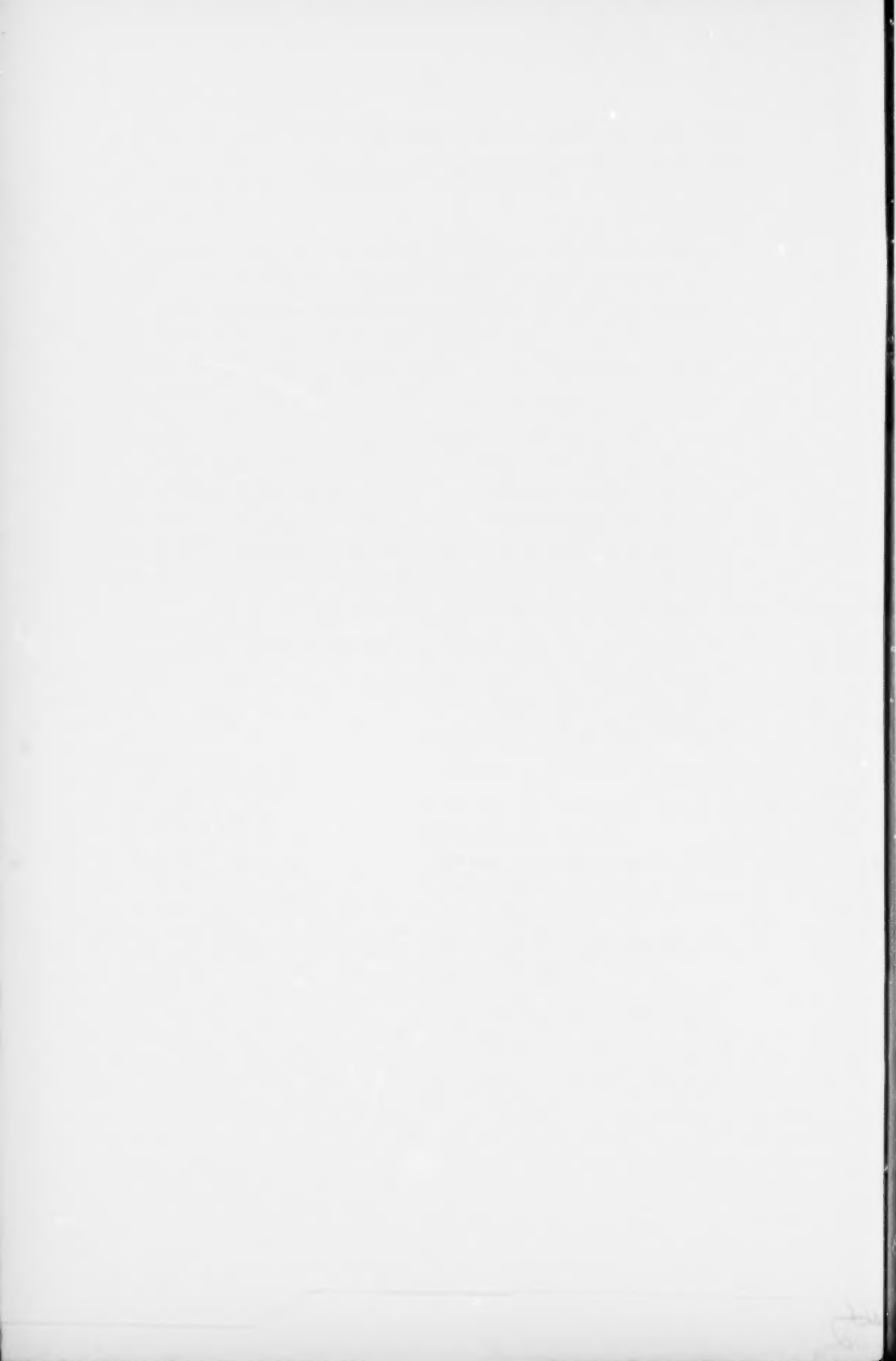
Dated: April 26, 1984

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NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

**FOURTH DIVISION
SEPTEMBER 8, 1983**

NO. 81-1851

**GRACE EVANGELICAL
LUTHERAN CHURCH
OF RIVER FOREST, ILLINOIS,**
an Illinois religious corporation,
Plaintiff-Appellee,
Cross-Appellant,

v.

**THE LUTHERAN CHURCH-
MISSOURI SYNOD, a Missouri
not-for-profit corporation and
CONCORDIA TEACHERS
COLLEGE, an Illinois not-for-profit
corporation,**
Defendants-Appellants,
Cross-Appellees.

Appeal from the
Circuit Court
of Cook County.

Honorable
James C. Murray,
Presiding.

PRESIDING JUSTICE ROMITI delivered the opinion of the court:

This is an appeal by all parties from an order of the circuit court of Cook County declaring an option agreement to be valid and legally binding, but also declaring that a particular provision of that option agreement was unenforceable at law because such enforcement would necessitate an impermissible intrusion by the court into matters of religious doctrine and polity.

We affirm.

Appellant and cross-appellee, the Lutheran Church-Missouri Synod (the Synod), a Missouri not-for-profit corporation, is the second largest Lutheran church body in North America. Appellant and cross-appellee, Concordia Teachers College, is an Illinois not-for-profit corporation located in River Forest. Concordia is owned and maintained by the Synod. (All further references to positions taken by the Synod in this appeal also apply to Concordia.) Appellee and cross-appellant, Grace Evangelical Lutheran Church of River Forest, Illinois (Grace), is an incorporated congregation with approximately 1700 members. Intervenor Wilbur Werling, Carl Driessnack, Loren Saar, and Henry Eickelberg, who are appellants and cross-appellees in this appeal, represent a group of Grace members who disagree with certain actions undertaken by Grace.

Grace was incorporated in 1902 and became a member of the Synod in 1903. In 1929 Grace purchased from the Synod the property which is the subject of this dispute, about one acre of land located on Concordia's campus. On that land Grace's present church structure was built. The property was conveyed pursuant to an agreement, signed by Grace, Concordia, and the Synod, granting the Synod and Concordia a ninety-nine year option to repurchase the property upon the happening of any one of three events:

(A) Whenever Grace sought to sell the property and received a bona fide offer from a bona fide purchaser, the Synod had the right to purchase the property at that price. If the price was not agreeable to the Synod and they could not agree with Grace on a price within twenty days, then three "appraisers" would be selected (one by Grace, one by the Synod, and the third by the first two appraisers) to determine the price and terms. The results of this "arbitration" were to be accepted within twenty days. The Synod was also required to exercise its option under this clause within forty days of receiving notice from Grace of the receipt of a purchase offer;

(B) Whenever Grace decided to affiliate, consolidate or merge with any other corporation, association or organization not affiliated with the Synod;

(C) "Whenever [Grace] shall fail or decide to not teach and preach the scriptures as set forth under Article II entitled 'Confession' of the Constitution of said Missouri Synod and in accordance with the rules, regulations and customs of [the Synod]." (The "Confession" states that the Synod and its members accept without reservation the Bible as the only rule and norm of faith and practice and certain other religious writing as the "true and unadulterated statement and exposition of the Word of God.")

The agreement also provided that upon the happening of either of the latter two events the Synod or Concordia had the option of repurchasing the property with its improvements. If a price could not be agreed on within thirty days then the price was to be "arbitrated" within sixty days by three men selected in the same manner as provided for under Paragraph A. Their findings were to be accepted within ten days. The agreement further stated that failure to exercise the option "within the time specified" would relieve Grace of all obligations under the agreement and render it null and void.

Grace purchased the property for \$20,000. Five-thousand dollars was paid in cash and the remaining amount was paid over a period of years, with some of that money allocated from money Grace had collected from its congregation for Synod purposes.

In the 1970's certain controversies within the Synod caused Grace to re-evaluate its position in that body. One of these controversies concerned a resolution passed at the Synod's 1973 convention, declaring that certain members of the faculty of Concordia Seminary in St. Louis were teaching false doctrine. Grace had opposed this resolution. Most

of the faculty and many of the students of the seminary left it to form a school called Seminary in Exile, or Seminex.

On June 13, 1976 Grace ordained as assistant pastor Aaron Sorrels, a graduate of Seminex who had not been certified by the Synod as required under Synod rules. The Synod and Concordia had opposed his ordination because of this lack of certification, however there were continuing efforts by the parties to reconcile their differences on this issue before and after the ordination.

On August 24, 1977 Grace's church council recommended to the congregation that Grace withdraw from the Synod. On September 20, 1977 the Voters' Assembly of Grace voted to accept this recommendation effective October 1, 1977. On that latter date the Synod and Concordia notified Grace that they were exercising their option to repurchase the property.

On October 28, 1977 Grace filed a complaint for declaratory judgment, seeking a declaration that the option agreement was unenforceable under the First Amendment and under principles of contract law. The Synod and Concordia filed an answer and counterclaim in which they sought a declaration that they were entitled to repurchase the property pursuant to paragraph C of the option agreement. Intervenors were permitted to file a complaint for injunction and other relief in which they raised certain procedural objections to the vote taken by Grace. (They have abandoned these contentions on appeal.)

After the filing of Grace's complaint the Synod asked its Commission of Adjudication to resolve this dispute. Under Synod rules that body had jurisdiction in resolving disputes involving the Synod as a party. Grace did not participate in the ensuing proceedings, having advised the Synod that because of Grace's withdrawal from the Synod it did not believe the Synod's adjudicatory bodies had jurisdiction and that in any event such an adjudication would not even be binding on the Synod's member congregations because of their autonomy. On June 12, 1978 the Synod Commission of

Adjudication rendered a decision holding that Grace had violated the rules, regulations and customs of the Synod and therefore the Synod was entitled to exercise the option.

Intervenors sought an adjudication before a Synod District Commission of Adjudication, the body having jurisdiction over disputes among members of a particular district of the Synod. Grace also declined to participate in these proceedings. On August 7, 1978 that body determined that Grace had acted contrary to the scriptures in various respects and that as a consequence a schism was created in the congregation. In an addendum issued April 30, 1979 the District Commission also found that members of Grace who had opposed Grace's actions were entitled to the church property by virtue of Article XV of the Constitution and By-laws of Grace, which stated:

"If at any time a schism should take place in the congregation which God may graciously prevent, the property of the congregation and all benefit connected therewith shall remain with those members who shall adhere to the unalterable articles of this constitution * * *."

In various pleadings before the trial court the Synod and intervenors also contended that these findings were binding on the courts.

At the close of discovery Grace and the Synod each moved for summary judgment. Acting on these motions and on intervenors' motion that the court adopt the findings of the District Commission of Adjudication, the trial court issued its order, holding that the option agreement was valid and legally binding on the parties but the provisions of paragraph C could not be enforced by a civil court because of First Amendment restrictions.

Although the State has a legitimate interest in providing a forum for the peaceful resolution of church property disputes, the civil court's role is severely circumscribed by the First Amendment and accordingly the courts may not

resolve such disputes on the basis of religious doctrine and practice. (*Jones v. Wolf* (1979), 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church* (1969), 393 U.S. 440, 21 L.Ed.2d 658, 89 S.Ct. 601.) When those matters are at issue in a property dispute involving a hierarchical church organization, the civil courts must defer to any resolution of those issues reached by the highest authority within that church organization. (*Jones v. Wolf* (1979), 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020; *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 49 L.Ed.2d 151, 96 S.Ct. 2372.) However so long as no consideration of doctrine is involved the States are free to adopt any one of various approaches for settling church property disputes. (*Jones v. Wolf* (1979), 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020.) One such method, specifically approved by the court in *Jones*, is the neutral principles of law approach in which a court determines property ownership by applying general principles of property law and examining the terms of the local church charters, state statutes governing the holding of church property, and other pertinent documents such as provisions in the constitution of the general church pertaining to the ownership and control of church property. Again, however, if the church documents expressly incorporate religious concepts in the provisions relating to the ownership of property so that interpretation of those documents will require the court to resolve a religious controversy, then the court must defer to the resolution of those issues by the authoritative ecclesiastical body, assuming that the polity of the church is easily determined without intrusive scrutiny by the court. *Jones v. Wolf* (1979), 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020; *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 49 L.Ed.2d 151, 96 S.Ct. 2372; *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.* (1970), 396 U.S. 367, 24 L.Ed.2d 582, 90 S.Ct. 499, (Brennan, J., concurring).

In accordance with these principles of law we first consider the contentions of the parties which purportedly

involve only the application of neutral principles of law to the resolution of this dispute.

A number of the Synod's contentions on appeal depend upon the premise that it is entitled to exercise the option upon a finding that Grace violated the rules, regulations, and customs of the Synod. We need not examine these contentions in detail because we find that premise to be contrary to our construction of the pertinent option provision, paragraph C. The Synod apparently contends that this clause means that the option can be invoked if Grace violates the Synod's secular rules and customs without the necessity of establishing any deviation from the Synod's religious precepts. However, we find that under a plain reading of the option provision it is subject to being exercised only if the *teaching and preaching of the scriptures* at Grace was not in accordance with the rules and regulations of the Synod. Thus a finding that Grace violated the rules and customs of the Synod without regard to the impact of those violations on Grace's adherence to the Synod's doctrinal positions would not suffice to permit exercise of the option. It is also clear, as the trial court found, that in deference to the First Amendment the courts cannot resolve the question of whether the scriptures are being preached and taught in accordance with certain doctrinal positions. *Jones v. Wolf* (1979), 443 U.S. 595, 61 L.Ed.2d 775, 99 S.Ct. 3020; *Eddy ex rel Pfeifer v. Christian Science Board of Directors* (1978), 62 Ill.App.3d 918, 379 N.E.2d 653.

The Synod contends that independent of the option contract between the parties, the trial court should have found that either a resulting trust or a constructive trust was established in favor of the Synod and Concordia. Generally a resulting trust arises when one person buys property with his own funds and title is taken in the name of another. (*In re Estate of Wilson* (1980), 81 Ill. 2d 349, 410 N.E.2d 23.) In this cause it is undisputed that Grace ultimately furnished the consideration for the property. Although the Synod initially loaned Grace a substantial portion of the cash used

to purchase the property, that loan was repaid in full by Grace. A resulting trust does not arise where the funds furnished by a third party are in the form of a loan. *Fields v. Fields* (1953), 415 Ill. 324, 114 N.E.2d 402; *Zack Co. v. Sims* (1982), 108 Ill. App.3d 16, 438 N.E.2d 663.

Nor do we find persuasive the Synod's contention that a constructive trust should be imposed. A constructive trust may be imposed whenever it is established that one person holds property which in equity and good conscience should be possessed by another. (*Zack Co. v. Sims* (1982), 108 Ill. App.3d 16, 438 N.E.2d 663; *Steinmetz v. Kern* (1941), 375 Ill. 616, 32 N.E.2d 151.) But in this cause for the trial court or this court to impose such a trust would require precisely the kind of searching inquiry into religious doctrine which the courts are forbidden to undertake. Fundamentally, the Synod's equitable arguments in favor of imposing such a trust are grounded in the contention that Grace was not justified in withdrawing from the Synod. But such a determination would involve the searching evaluation of matters of doctrine and church practice that this court cannot make.

In its cross-appeal Grace had contended that as a matter of law the option agreement is unenforceable because it contains no definite price term and because its provisions relating to arbitration of the price are void and, in any event, uncertain. Grace also contends that the Synod and Concordia failed to seek to exercise the option within a reasonable time and therefore the option is void by its own terms. On these grounds Grace seeks reversal of the trial court's order insofar as it declared the option to be valid and binding.

The Synod concedes that the option does not contain a specific price of the property. But they note that it does contain provisions for ascertaining that price. As we have set out earlier in this opinion, upon the exercise of the option, price disagreements were to be resolved by the appraisers in a process that was referred to in the option contract as arbitration. Grace relies on the fact that until the adoption

of the Uniform Arbitration Act (Ill.Rev.Stat. 1981, ch. 10, par. 101 *et seq.*), in 1961, agreements to arbitrate future disputes were not valid in Illinois, in accord with the common law rule. (*Cocalis v. Nazlides* (1923), 308 Ill. 152, 139 N.E. 95; *Godare v. Sterling Steel Casting Co.* (1981), 96 Ill.App.3d 601, 421 N.E.2d 925; Ill.Ann.Stat., ch. 10, par. 101, Introductory Notes, at 401 (Smith-Hurd 1975).) However this rule was not applicable to provisions concerning the valuation of property or other matters when that valuation was merely ancillary to a contract. (*Cocalis v. Nazlides* (1923), 308 Ill. 152, 139 N.E. 95; *Norton v. Gale* (1880), 95 Ill. 532.) The "arbitration" provision at issue here was not intended to resolve an ultimate legal issue such as the existence of grounds to permit exercise of the option, rather it was intended to establish the value of the property in the event the option was exercised. As such it was a valid provision despite common-law proscriptions concerning arbitration provisions pertaining to future disputes. *Hamilton v. Home Insurance Co.* (1890), 137 U.S. 370, 34 L.Ed. 708, 11 S.Ct. 133; 16 S. Williston, *A Treatise on the Law of Contracts* § 1918A (3d ed. 1976).

Grace also contends that even if the use of arbitrators was valid, the option is invalid because it does not specify the standard to be used by them in arriving at a price. As we have noted the first clause, pertaining to a right of first refusal, specifically referred to the arbitrators as "appraisers." Although in a subsequent clause pertaining to the option exercise at issue here the arbitrators are referred to only as "men", it is clear that the use of appraisers was contemplated throughout. Numerous Illinois cases have approved similar terms as providing a sufficiently precise standard of determining price and accordingly we find no merit to Grace's objection on this ground. *Norton v. Gale* (1880), 95 Ill. 533; *Stose v. Heissler* (1887), 120 Ill. 433, 11 N.E. 161; *Chicago Title & Trust Co. v. Northwestern University* (1976), 36 Ill.App.3d 165, 344 N.E.2d 52.

Grace next contends that in any event the Synod did not exercise its option within a reasonable time and for that reason the option is void. Grace concedes that as to the exercise of the option based on paragraph C no specific time limit is specified. However Grace contends that implicit in the contract is a requirement that such exercise take place within a reasonable time. (*Yoder v. Rock Island Bank* (1977), 47 Ill.App.3d 486, 362 N.E.2d 68.) Grace notes that although the Synod has cited the ordination of Aaron Sorrels as one of the ways in which Grace violated the terms of paragraph C, the Synod did not seek to exercise its option until more than fifteen months after that ordination. The record establishes however that the precipitating event for the Synod was Grace's decision to withdraw from the Synod; the Synod notified Grace of its intentions on the very day Grace's decision became effective. After the ordination of Sorrels the record establishes that there were numerous efforts by the parties to reach a resolution of their disputes. Only when Grace ultimately decided to withdraw from the Synod did the Synod exercise its option. Under these circumstances we do not find that the lapse of time between the ordination and the Synod's ultimate decision was unreasonable. See *Yale Development Co. v. Aurora Pizza Hut Inc.* (1981), 95 Ill.App.3d 523, 420 N.E.2d 823.

Intervenors contend that irrespective of its polity the Synod's adjudications should have been enforced because under the law of voluntary associations courts must accept such associations' interpretations of their own rules. But in this cause the dispute itself involves the question of the division of authority within the Synod; whether the congregation or the governing authorities of the Synod are the ultimate arbiters of doctrinal divisions. Thus we are squarely presented with the question of the polity of the Synod.

As we have noted earlier, one method the courts may use to resolve church property disputes without becoming impermissibly involved in questions of religious doctrine and

practice is to determine the polity of the church organization and to then defer to the authoritative determination of the conflict by the highest authority within that organization. All the parties to this appeal contend that this dispute may be resolved in this manner. Of course the parties do not agree about which body holds that authority. Nor do they even agree as to the nature of the determination made by one of those bodies, the Synod.

We are primarily concerned here with the distinction between congregational and hierarchical polities. A church with a congregational polity has been defined by the United States Supreme Court as one in which:

“* * * the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church governance is concerned, owes no fealty or obligation to any higher authority.” (*Watson v. Jones* (1872), 13 Wall. 679, 722.)

One article on the subject has defined a congregational polity as one in which “each local congregation is self-governing [and] * * * in which the autonomy of the local congregation is the central principle.” (Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L.Rev. 1142-1143-44 (1962).) A hierarchical church polity was defined in *Watson* as one:

“* * * where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.” (*Watson v. Jones* (1872), 13 Wall. 679, 722-23.)

These are theoretical categories, however, and it has been recognized that it is possible for a church to constitute a combination of hierarchical and congregational aspects.

(*Kelley v. Riverside Blvd. Independent Church of God* (1976), 44 Ill.App.3d 673, 358 N.E.2d 696.) Thus in this cause the parties all agree that with respect to the ownership of property the Synod is congregational. Its rules provide that membership of a congregation in the Synod gives the Synod no equity in the congregation's property. However this aspect of the polity of the Synod is not dispositive in this property dispute because we are concerned with the alleged violation of a requirement of doctrinal purity and the question of who has the power to decide such issues within the church.

The Synod and intervenors contend that with respect to doctrine the polity of the Synod is hierarchical. On this ground the Synod contends that the trial court should have deferred to the determination of the Synod's Commission of Adjudication that Grace had deviated from the scriptures in its teaching and preaching. The Synod contends that based on this allegedly authoritative determination it was entitled to exercise the option. Intervenors also cite the determination of this Commission but they rely on that part of the determination which found that because of these violations a schism had been created and the minority members of Grace were entitled to the property of the congregation. Thus intervenors seek to have themselves and those they represent awarded the property. Presumably this would vitiate any need for the Synod to seek to exercise its option. However, in oral argument the Synod has indicated that it seeks the right to exercise its option in derogation of the intervenors' claim.

It is Grace's contention that the Synod has a congregational polity and thus the courts should defer to Grace's determination that it continues to properly teach and preach the scriptures in conformity with the Synod's doctrine, rules, and practices.

Included in the record on appeal are the constitution and by-laws of the Synod and of Grace, histories of the Synod, minutes of Synod meetings, reference books on religious organizations in America and numerous other documents

relating to this issue. Upon a review of all of this material we conclude that the polity of the Synod is not a readily ascertainable fact. We find that the trial court correctly concluded that an attempt to determine this fact would in this case necessarily involve the courts in “* * * a searching and therefore impermissible inquiry into church polity.” *Serbian Eastern Orthodox Diocese v. Milivojevic* (1976), 426 U.S. 696, 723, 49 L.Ed.2d 151, 170, 96 S.Ct. 2372, 2387.

Our inability to readily (and thus constitutionally) determine the polity of the Synod is illustrated by the following examples from the evidence presented to the trial court and to us on appeal. The Synod presented the affidavit of Dr. Herbert Mueller, Secretary of the Synod and also a member of the Synod's Commission on Constitutional Matters, a body charged under Synod rules with interpreting the Synod's constitution and by-laws. Dr. Mueller avers that:

“* * * the Synod regards its member congregations as having voluntarily relinquished a portion of their autonomy by associating with other member congregations within the Synod, especially in doctrinal matters, in procedures involving the adjudication and appeal of doctrinal issues, and in its own rules, regulations, custom, and polity. In this respect the Synod regards itself as having hierarchical character, as that has been articulated by some civil courts.”

However, Dr. Mueller also concedes in the affidavit that he was not presenting the official position of the Commission on Constitutional Matters. Grace presented the affidavit of Martin E. Marty, Fairfax M. Cone Distinguished Service Professor at the University of Chicago Divinity School, with a doctorate in American Religious and Intellectual History. Marty is a past president of the American Society of Church Historians and is an ordained Lutheran minister. Marty

averred that upon a review of the Synod's constitution, by-laws, and history he had concluded that:

"* * * the Lutheran Church-Missouri Synod is a religious denomination of congregational polity, that is to say that the majority of the voting members of a [Synod] congregation is the final arbiter of whether determinations of the Synod 'are in accordance with the Word of God or expedient as far as the condition of a congregation is concerned.'"

All the parties cite to various provisions of the by-laws and constitution of the Synod. Grace notes that Article VII of the Synod's constitution provides:

"In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body. Accordingly, no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God or if it appears to be inexpedient as far as the condition of a congregation is concerned."

On the other hand the Synod and intervenors cite by-laws provisions permitting the Synod to suspend and expel members who act contrary to certain doctrinal statements (Synod Constitution, Article XIII) and establishing an elaborate procedural structure for adjudication and appeal of disputes within the Synod (By-Laws of the Synod, Section V).

Grace cites the conclusion of Dr. Carl S. Munding, a Synod historian, that the Synod's constitution "made the congregation the possessor of all church power and the highest tribunal * * *." (Carl S. Munding, *Government in the Missouri Synod*, p. 196 (1947).) But the Synod in turn notes

that Munding stated that because of the Synod's supervisory powers over pastors and teachers it:

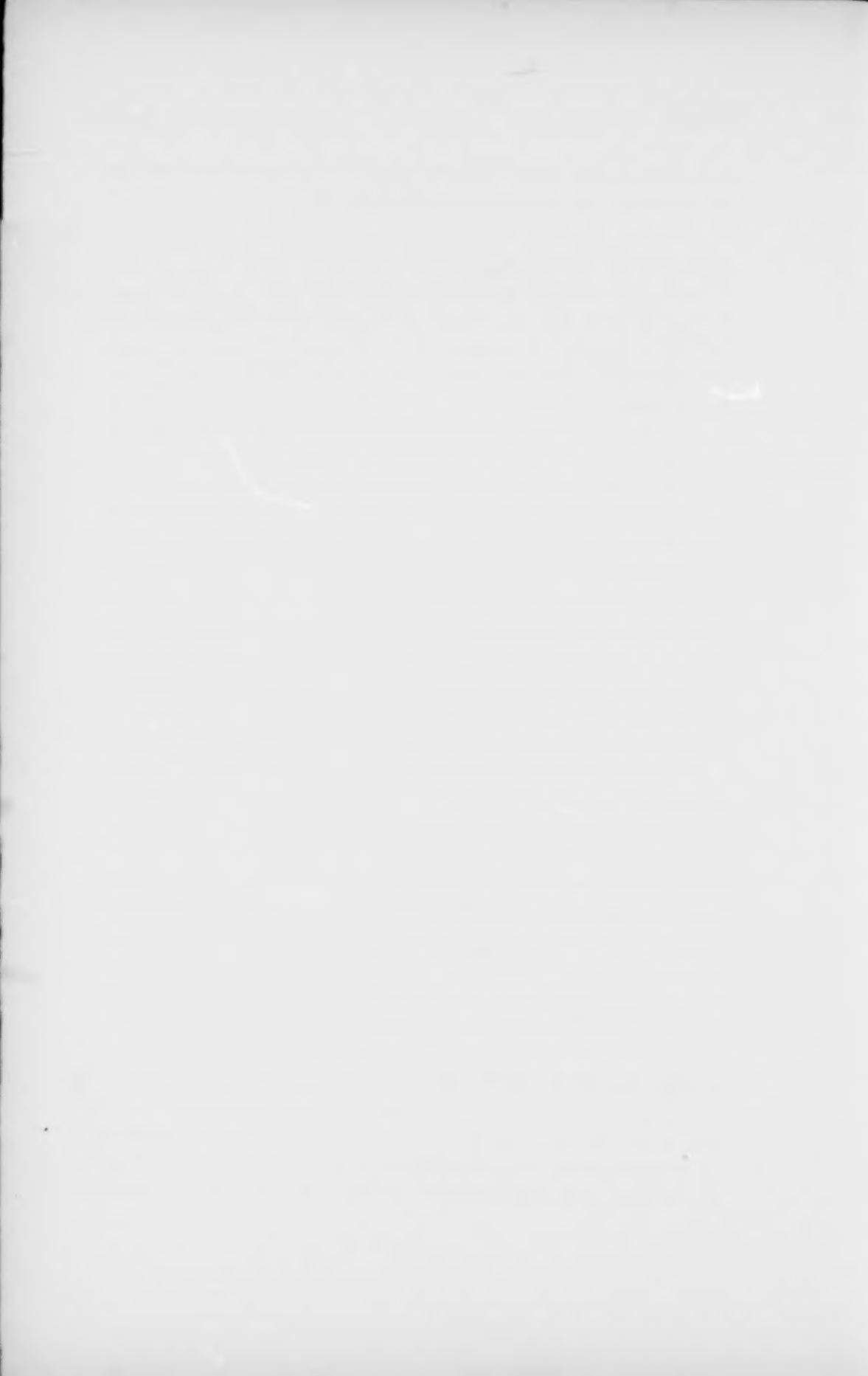
"* * * could exercise, and did exercise, control over the lives of all the pastors and teachers and over all the doctrine taught in the member churches. It is no exaggeration to say that this provision made it possible for an energetic President of Synod to determine what should be taught, how it should be taught, and who should do the teaching. Given the other provision of the constitution that all matters of doctrine and faith are to be decided by the Word of God and not by majority vote, the President of Synod could exercise influence over doctrine and life of both pastor and congregation altogether out of keeping with the commonly accepted concept of a strictly independent local congregation." Munding, pp. 187-188.

Upon review of such conflicting evidence and of the voluminous documents contained in the record we have found that we cannot constitutionally make the extensive inquiry and evaluation necessary to determine the polity of the Synod with respect to doctrinal disputes. The other neutral methods of resolving this dispute advanced by the parties have also not sufficed. Thus, although we have found no merit to Grace's contentions with respect to the legal invalidity of the option contract at issue, we have also determined that on the record before us we cannot constitutionally determine whether that option can be exercised.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

JIGANTI and LINN, JJ., concur.



B-1

**ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035**

January 31, 1984

Mr. Richard S. Reizen
Joyce & Kubasiak
Three First Natl. Bank Plaza
Suite 3900
Chicago, IL 60602

No. 59310—Grace Evangelical Lutheran Church of River
59357 Forest, etc., respondent, vs. The Lutheran
Cons. Church—Missouri Synod, etc., et al., petitioners.
Leave to appeal, Appellate Court, First District.

The Supreme Court today entered the following order in
the above entitled cause:

Petitioner having failed to file a petition for leave to
appeal in case *No. 59310* this cause is dismissed. The
petition for leave to appeal in cause *No. 59357* is denied.

The mandate of this Court will issue to the Clerk of the
Appellate Court on February 22, 1984.



UNITED STATES CONSTITUTION

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION
AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives—Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such States.

Section 3. Disqualification to hold Office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the

United States, shall have engaged in insurrection or rebellion against the same, or given aid of comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.



ADDENDUM TO A DECISION OF:

The Commission of Adjudication
The Northern Illinois District
The Lutheran Church-Missouri Synod

Decision issued on August 7, 1978

Re: Grace Lutheran Church, River Forest, Illinois and charges brought against it by Mssrs. Saar, Eichelberg, Chachula, Kreiss, Brockberg and Werling.

Addendum issued on April 30, 1979

In response to a Petition, dated March 20, 1979, of Mssrs. Saar, Eichelberg, Chachula, Kreiss, Brockberg and Werling, (hereinafter the "Petitioners") regarding the clarification of the decision of August 7, 1978, regarding charges by the Petitioners against the majority members of Grace Lutheran Church, River Forest, Illinois.

ADDENDUM:

In order to clarify an apparent inconsistency in its decision of August 7, 1978, the Commission of Adjudication hereby states the following:

In finding that the Petitioners' charges were judged to be either sustained and Grace Lutheran Church to be found guilty, or not sustained and Grace Lutheran Church to be found not guilty, the Commission of Adjudication specifically states that its adjudication and judgment of Grace Lutheran Church and its actions is to be understood in terms which recognize Grace Lutheran Church as a corporate entity.¹

The Commission of Adjudication further states that the Petitioners and any who may be in accord with them, are not to be judged as in agreement with, or a party to, any of the actions or charges of which Grace Lutheran Church was found to be guilty in the Commission's decision and thereby not to be considered as standing under the Commission's judgment of guilty, even though the Petitioners and any

who may be in accord with them are still members of Grace Lutheran Church.

The Commission of Adjudication finally states that the Petitioners and any who may be in accord with them, not being judged guilty of any of the charges brought against Grace Lutheran Church and sustained, including Charge A.3:

3. By creating a schism within the congregation through the above-mentioned actions, and by violating the practices and customs of the Lutheran Church—Missouri Synod (Articles II, III, and IV).²

are thereby entitled to the benefits and protection of the Constitution and By-Laws of Grace Lutheran Church, including Article XV. SCHISM, which reads:

If at any time a schism should take place in the congregation which God may graciously prevent, the property of the congregation and all benefits connected therewith shall remain with those members who shall adhere to the unalterable articles of this constitution mentioned in Article XVI.³

FOOTNOTES:

1. Page 1, Decision: "Position and actions of Grace Congregation as a duly constituted body."
2. Page 3, Commission decision of August 7, 1978
3. Article XVI of the Constitution and By-Laws of Grace Lutheran Church reads:

To alter or repeal any article in these By-Laws, it shall be requisite that in two consecutive constitutional meetings of the congregation two-thirds of all the voting members present cast their votes in favor of such alteration or repeal.

Of this constitution, Articles 2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 15, and 16 shall be unalterable and irrepealable.

This concludes the Addendum.

The Commission of Adjudication

The Northern Illinois District

The Lutheran Church-Missouri Synod

Date: April 30, 1979

The Rev. Charles A. Gierke, Chairman

The Rev. Raymond E. Weber, Secretary

The Rev. Elmer T. Groteleuschen

Mr. Roland Herrmann

Mr. Charles Lantry

Mr. Kenneth C. Schuh

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

The second part of the paper is devoted to a discussion of the various theories of the origin of life. It is shown that there are three main theories: the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. The theory of spontaneous generation is the oldest and simplest, but it is also the least plausible. The theory of biogenesis is the most plausible, but it is also the most difficult to prove. The theory of abiogenesis is the most difficult to prove, but it is also the most plausible.

The third part of the paper is devoted to a discussion of the various experiments that have been conducted to test the theories of the origin of life. It is shown that there have been many experiments, but none of them have been able to prove any of the theories. This is because the experiments have been conducted under conditions that are not representative of the conditions that existed on the early Earth.

The fourth part of the paper is devoted to a discussion of the various conclusions that can be drawn from the experiments. It is shown that the experiments have not been able to prove any of the theories, but they have shown that the origin of life is a very complex problem.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GRACE EVANGELICAL
LUTHERAN CHURCH
OF RIVER FOREST, ILLINOIS,
an Illinois religious corporation,
Plaintiff,

v.

THE LUTHERAN CHURCH-
MISSOURI SYNOD, a Missouri
not-for-profit corporation and
CONCORDIA TEACHERS
COLLEGE, an Illinois
not-for-profit corporation,
Defendants.

No. 77 L 21002

FINAL JUDGMENT ORDER

This cause coming on to be heard for entry of a final judgment Order on plaintiff's motions for summary judgment, on defendants' motion for summary judgment and on intervenors' motion to reconsider and adopt the findings and decision of the Synodical District Commission, counsel for all parties having submitted numerous memoranda of law and having presented oral argument, and the Court having issued a written opinion, a copy of which is attached hereto as Exhibit A, setting forth its findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The 1929 option agreement referred to in the opinion attached hereto as Exhibit A is valid and legally binding on plaintiff and defendants.

2. The provisions of paragraph 1(C) of the aforesaid 1929 option agreement are unenforceable in a civil court as applied to the undisputed facts in this case;

3. Plaintiff's motion for summary judgment and the relief requested in its complaint is granted to the extent of the declaration contained in paragraph 2 of this order. The remainder of plaintiff's motion for a summary judgment and the relief requested in its complaint is denied and dismissed.

4. Defendants' motion for summary judgment and the relief requested in their counterclaim and their motion for summary judgment is granted to the extent of the declaration contained in paragraph 1 and the second sentence of paragraph 3 of this Order. The remainder of defendants' motion for summary judgment and the relief requested in their counterclaim is denied and dismissed.

5. Plaintiff's motion for summary judgment on intervenors' complaint is granted and intervenors' complaint is dismissed. Intervenor's Motion To Reconsider and Adopt The Findings And Decision Of The Synodical District Commission is denied.

6. Each party shall bear its own costs.

7. The findings of fact and conclusions of law contained in the Opinion attached hereto as Exhibit A are incorporated in this Final Judgment Order by reference.

8. There is no just cause to delay appeal.

ENTERED:

James C. Murray
Judge

Dated: _____

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
LAW DEPARTMENT-COUNTY DIVISION**

**GRACE EVANGELICAL
LUTHERAN CHURCH, et al.,**

v.

**THE LUTHERAN CHURCH-
MISSOURI SYNOD, et al.**

No. 77 L 21002

OPINION

THIS CAUSE comes before the court on motions for summary judgment filed by each of the respective parties. The case involves a real estate contract entered into by some of the parties in 1929 involving Real property located in River Forest, Illinois. Although the major purpose of the contract was a conveyance of land from one party to the other, the agreement presents novel and important issues of constitutional law. These questions arise out of an option clause contained in the contract documents providing that upon the occurrence of certain actions on the part of the grantees, the grantors would have a right to repurchase the Real property at a price fixed by arbitrators.

All parties through their respective able counsel have submitted excellent and thorough briefs in support of their respective positions and have made full and complete oral arguments.

THE PARTIES

It is necessary to begin the court's opinion with an introduction of parties.

The plaintiff is the Grace Evangelical Lutheran Church of River Forest (hereafter called Grace), an Illinois Religious Corporation.

The Defendants are the Lutheran Church—Missouri Synod (hereafter called simply the "Synod"), a Missouri Corporation and Concordia Teacher's College (hereafter called "Concordia"), an Illinois not-for-profit corporation.

Certain members of the plaintiff Grace, intervened as party defendants. They will hereafter be called the Intervenors.

THE HISTORY OF THE DISPUTE

A history of events giving rise to the case is also necessary.

The Synod is the second largest Lutheran Church body in North America.

Its contribution to America's educational and social progress is most impressive. It maintains a large extensive school system throughout the country as well as an important system of social services.

Concordia maintains an excellent higher educational facility in River Forest, Illinois. At all times Concordia has been owned and maintained by the Synod. Originally, Concordia College was located in Indiana. Its construction at its present River Forest site was begun in 1912, with the dedication taking place in 1918. Concordia appears to have been primarily devoted to the preparation of teachers for the Synod's school system.

The plaintiff, Grace, joined the Synod shortly after its incorporation in 1902. Grace was originally located in Oak Park, Illinois. After the relocation of Concordia College from Indiana to River Forest, Illinois, Grace became like a

church home for Concordia's faculty and students, it being located in Oak Park, a short distance from Concordia's River Forest campus.

In its founding years Concordia and Grace entered into an arrangement whereby the lower grades of the Grace School were taught on the Concordia's Campus in River Forest as part of Concordia's student teaching program. This school became known as the training school. Grace maintained its own school in Oak Park for the upper grades.

Because of the obvious problems in running a bifurcated school program, Concordia and Grace discussed unification of the two school programs. This unification was not complete until Grace actually moved its entire physical facility to the Concordia Campus.

In the mid-1920's, Grace decided to expand its then physical facilities by building an entirely new church and school. Although several alternative sites were considered, Grace finally decided to relocate on the corner of Bonnie Brae and Division, which is the extreme north-east corner of Concordia's campus.

Extensive negotiations were entered into between the Synod, Concordia and Grace, pursuant to the proposed transfer of this property. For example, since Concordia's property had originally been acquired from Lutherans in Chicago for the purpose of maintaining a Missouri Synod Institution, Concordia at first did not feel that it was appropriate to sell the property outright to Grace, and, instead, proposed a 99 year lease of the land. Grace rejected this proposal however, and the property was eventually sold to Grace in fee simple, with full consideration being paid.

During these contract negotiations, several letters went back and forth between the parties, attempting to get the written contract to reflect the parties' divergent intents. Supplemental agreements were drafted and rejected, until finally an option agreement prepared by Grace was accepted by all the parties. Consequently, the sale of the property was

predicated on a February 2, 1929 sales contract as well as the option Agreement prepared by Grace and signed on March 19, 1929. The option Agreement was expressly regarded as part of the consideration for the sale of the property.

As the cash consideration, Grace paid the Synod \$5,000.00 outright and signed notes for the additional \$15,000.00. The Synod contends that it agreed to hold the money as an endowment for Concordia.

Of particular importance, in this case, is the language of the Agreement itself, for the 1929 Option Agreement gave the Synod and Concordia the privilege to repurchase the property from Grace for 99 years from the date of the agreement or the happening of certain events including:

"1. A. Whenever said first party (Grace) should desire to sell or dispose of the property... (to a third party)

B. Whenever said first party shall during said period decide to officiate, consolidate or merge with any other corporation, association or organization not being affiliated with said Missouri Synod, herein designated as second party.

C. Whenever said first party shall fail or decide or decide to not teach and preach the scriptures as set forth under Article II entitled "Confessions" of said Synod, and in accordance with the rules, regulations, and customs of the second party."

It is the third provision of the agreement, which has been underscored, that gives rise to the instant controversy.

There is no suggestion or charge that Grace desires to sell or dispose of the property; quite the contrary. There is no suggestion or charge that Grace decided to affiliate, consolidate or merge with a corporation, etc. not affiliated with the Missouri School.

It is the contention of the Synod, Concordia and Intervenor that Grace has failed or decided "not to teach and preach the scriptures as set forth under Article II entitled "Confessions" of said Synod, and in accordance with the rules, regulations and customs of the "Synod". All the defendant parties claim Grace's action triggered the option.

The court by reason of constitutional prohibitions herein-after referred to is inhibited from examining religious doctrinal disputes. Nevertheless a brief recitation of the events that gave rise to the dispute as disclosed by the brief, argument, and pleadings, is essential to determine the Court's Jurisdiction if any, in the matter.

Conflict between Synod and Grace apparently goes back to 1945, during one Dr. A. O. Geisman's pastorate of Grace. The conflict allegedly involved a difference of opinion as to the authority of the Synod over Grace's congregation. The alleged dispute apparently continued until the 1960's. It seems to have been aggravated by the election of Dr. Jacob A. O. Preus to the presidency of the Synod in 1969. Grace contends that Dr. Preus arbitrarily disciplined several pastors, teachers, seminaries and missions for preaching "false doctrine". Grace also appears to differ with the Synod's 1973 adoption of a theological statement made by Dr. Preus as "binding doctrine." Finally, Grace admits that it opposed the Synod's branding of the Concordia Seminary in St. Louis as a teacher of false doctrine, a move which assertedly caused a majority of the students and teachers at that school to leave and form their own school, Seminary in Exile. (also called "Seminex".)

These synodical controversies apparently caused Grace to re-evaluate its position in the Northern Illinois District of the Missouri Synod. At one point, there was some mention of the Church's transferring to the English District of the Synod, but apparently this suggestion was shelved in favor of a "wait-and-see" position to determine what direction the Synod would take in the future.

In 1976, Grace called and ordained Aaron Sorrels, a Seminex graduate, to be an assistant pastor. Both the Synod and Concordia objected to the ordination of Pastor Sorrels, since his name was not contained on the list of approved ministers put out by the Synod, and used to select pastors in accordance with Synod law.

Finally, in March of 1977, the Church Council of Grace Church proposed that a series of three special meetings be held to consider the relationship of Grace Church to the Synod. These "informational meetings" were held in March, April and May of 1977, upon full notice to members of the congregation. In August of that year, the Church Council voted to withdraw from the Synod, and a vote was scheduled before the entire membership on September 20, 1977.

Considerable correspondence went on between the parties prior to this vote, and an informational packet was sent to Church members to apprise them of the possible resolution to withdraw from the Synod. While Intervenor claim that the election was tainted by procedural unfairness, the result was that the Voter's Assembly voted 425-199 to accept the Church Counsel's recommendation and withdraw from the Synod.

On October 1, 1977, some ten days after this vote, the Synod and Concordia served their "Exercise of Option" on Grace, Grace subsequently filed this suit in the Circuit Court of Cook County. Basically, Grace is seeking a declaratory judgment that the 1929 option was not invoked by the vote to withdraw from the Synod, but in any case, is unenforceable under Illinois Contract Law and the First Amendment to the Constitution of the United States.

Similarly, the Synod and Concordia seek a declaration that they are legally entitled to purchase the property. The Intervenor are the minority members of the Grace Congregation who voted or desired to remain with the Synod. They not only object to the procedural fairness of the vote to separate, but they also seek a declaration that they now comprise the legal majority of Grace Church, with all the

privileges and rights attendant to that position, so stated by the Missouri Synod's District Commission adjudication of that case.

The Court wishes to reiterate that this recitation of the historicity of the dispute between the parties is made without any judicial examination of the legality, morality, or even the accuracy of the position of the various parties during the development of the litigation. The aforesaid Recitations are merely statements of events gleaned by the court from the pleadings or extensive material filed by the parties. Their recitation is necessary for the only purpose of determining the legal principles the Court must apply to a case involving conflicting views of religious organizations or groups in a jurisprudence that interprets Religious Freedom in a policy of separation of Church from State.

Although at one time the Court was of the opinion that the case involved disputed issues of fact, not suitable for a motion for Summary Judgment under Chapter 110 Sec. 57 Ill. Rev. Stat. (1979). The court now feels that the uncontradicted evidence adduced and presented to the court by way of the motions for Summary Judgment makes the case one decidable as a pure question of Law.

ARGUMENTS OF PARTIES

Plaintiff, Grace argues that any attempt by a civil court to interpret Paragraph 1C of the 1929 option as it applies to the facts in this case, necessarily involves a decision regarding the religious doctrines and practices of the Missouri Synod, Grace and even the Lutheran Faith. Grace contends that such a determination is prohibited by the principles of Religious Freedom guaranteed by the First Amendment of the United States Constitution. Grace's entire argument is based on the premise that its polity, that of the Synod and Lutheran Church is a congregational polity. Under a congregational polity Grace argues the decision of the congregation

is binding on a court under numerous court decisions interpreting and applying the application of the first amendment to actions of religious organization relating to property devoted to religious purposes.

Defendants Synod and Concordia argue that the Synod has a hierarchial polity in some respects and congregational in others. They assert that this dual polity of the Synod as applied to the facts in this case and the law relating to contracts and trusts impels a judicial conclusion that Grace's September 1977 action to become disaffiliated with the Synod triggered the 1929 option. They seek a denial of Grace's motion for summary judgment and a declaration of a right in Synod to purchase the real property of Grace at a price and terms fixed by arbitrators.

Intervenors agree with defendants as to the polity of the Synod. However, they assert that the law relating to disputes between religious groups and organizations impels this court to deny both the defendant's and plaintiff's motions for summary judgment and declare title to the property in dispute in the intervenor's of a Synod district tribunal. Intervenors also raise issues concerning the procedures and fairness of the procedures taken by Grace's majority in reaching its ultimate decision in 1977 to disaffiliate from the Synod.

The claims made by all parties appeared to the court to have been made with the deep and honest conviction of the parties and their counsel. The case was presented objectively and fully with an open mindness and respect for the court and opposing view seldom observed in a hotly contested legal proceeding and rarely seen in a cause involving a religious controversy.

The court attempted to find a legal solution acceptable to all parties. It could not. Its conclusion, herein, is based on an attempt to apply rigidly legal principles to a troublesome controversy between parties with an honest difference of

opinion that their deep religious convictions precludes compromising.

COURT'S CONCLUSIONS

A civil court's jurisdiction in the United States to resolve disputes involving church property is rightfully severely limited.

Past and present world history demonstrate that the American concept of separation of church and state and judicial timidity to interfere in doctrinal religious matters is a wise, political and judicial policy toward the ultimate moral goal of both government and religion, i.e. to make the strong just and the weak secure.

In numerous cases, our U.S. Supreme Court has held that courts are prohibited by the first amendment of the United States Constitution from deciding church property disputes on the basis of religious doctrine and practice. *MD & VA Churches v. Sharpsburg Church*, 396 U.S. 367 (1970); *Presbyterian Church v. Hull Church*, 393 U.S. 440(1969); *Watson v. Jones* 80 U.S. 679 (1871). This principle applies with equal force to all phases of a religious dispute including those over church polity and administration. *Serbian Eastern Diocese v. Milivojevich*, 426 U.S. 696 (1976). Where resolution of religious disputes cannot be made without inquiry into religious issues, the first amendment requires that civil courts defer to the decisions reached by the highest tribunal of the church involved. *Jones v. Wolf*, 443 U.S. 595, (1979). Despite these restrictions, and their broad application, our courts can be proper forums for settling disputes between religious groups providing their manner of resolution "involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith". *MD & VA Churches*, 396 U.S. at 368.

One manner of resolution which civil courts in cases of this nature can take is a neutral principles of law approach. Under a neutral principles approach courts rely entirely on

objective and well established principles of property and trust law in making their determinations. Besides being flexible and secular in nature, the neutral principles approach avoids all consideration of religious questions centering on issues of doctrine, policy and practice. The Supreme Court has held that "the neutral principles of law" method is consistent with first amendment principles. *Jones v. Wolf*, 443 U.S. 595 (1979).

The application of the neutral principle concept to this case, however, is judicially inappropriate. The issue which is at the core of this litigation cannot be solved solely on the basis of well established principles of property and trust law to wit: an examination of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." *MD & VA*, 396 U.S. at 368. In order for this court to decide whether the option contained in the 1929 sales agreement was triggered it must first determine whether or not Grace failed or decided "to not teach and preach the Scriptures" in accordance with the Synod's constitution and the rules, regulations and customs of the Synod. Such a determination would entangle the court in areas prohibited by the first amendment.

In the Supreme Court's most recent pronouncement on the role of civil courts in religious disputes, it recognized that while the neutral principles approach was beneficial, it was not by any means free of difficulty. Specifically the court noted that where the documents upon which the court is relying contain reference to religious concepts, and the interpretation of such provisions would require the court to resolve a religious controversy, then the court must defer to the resolution of the dispute by the authoritative ecclesiastic body. *Jones v. Wolf*, 443 U.S. at 604, citing *Serbian Orthodox Diocese*, 426 U.S. at 709. The language used in the option between Grace and the Synod embodied such a religious concept. This court cannot decide whether Grace failed to

teach and preach the Scriptures in accordance with the rules, regulations and customs without getting into matters of religious doctrine and practice. When the parties drafted the option agreement they failed to specify the manner in which a breach of the agreement would be determined.

The parties could have inserted language that prevented disaffiliation from the Synod during the 99 year life of the option. They could have provided for a hierarchial polity to decide the issues that might arise under the option.

The parties did not. They left it up to the courts to decide, in effect, whether any challenged actions of Grace departed substantially from the Synod's doctrine and practice. If this court were to embark on such an inquiry it would have no alternative but to go beyond the deed, church charter and church constitution and delve into purely religious concerns. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 450 (1969). The first amendment bars this type of 'departure from doctrine' inquiry, "[o]nly express conditions that may be effected without consideration of doctrine are civilly enforceable". *MD & VA Churches*, 396 U.S. at 369. The neutral principles of law approach cannot be relied on in this case as it would require specific findings by this court as to when and in what manner Grace departed from Synod's rules, regulations and customs.

Moving from the concept of applying neutral principles of law to the issues presented, which as indicated is impossible judicially without an unconstitution inquiry into Synod's custom rules and practices, the court considers the polity of the Synod.

All parties rely on Grace's and or Synod's polity as a basis for their respective rights to summary judgment.

Grace relies on and asserts congregational polity in support of its claim.

The defendant's and intervenors rely on a hierarchical in part and congregational in part polity in support of their contentions.

Polity as applied to religious organizations refers to the Church's civil political structure.

Courts have recognized two general types of religious bodies or organizations. The first, a "congregational" church has been defined by the Supreme Court as a church which "by the nature of its organization is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority". *Watson v. Jones*, 80 U.S. 679, 722 (1871); see *Lowe v. First Presbyterian Church of Forest Park*, 56 Ill.2d, 404, 308 NE 2d, 801 (1974). The second type of religious body is a "hierarchical" church. The Supreme Court has defined such churches "as those organized as a body with other churches having secular faith and doctrine with a common ruling convocation or ecclesiastical head." *Kedroff v. St. Nicholas Church*, 344 U.S. 94, 110 (1952). Depending upon the type of structure involved a civil court will determine whether the governing body of that structure has resolved the dispute; and if it has the court will enforce their decision. *Serbian Orthodox Diocese*, 426 U.S. at 724-25;

Kedroff, 344 U.S. at 113-114, *Watson*, 80 U.S. at 727. Under the facts of the present case, however, this manner of dealing with church disputes can not be utilized since the parties disagree as to whether the Missouri Synod is congregational or hierarchical in form.

As indicated Grace maintains that the Synod is congregational in polity and that this court must defer to the decisions of the congregation on religious doctrine and practice. In support of its contention, Grace relies on the Synod's history, its constitution, and on its publications. The Synod, on the other hand, asserts that it is mainly hierarchical in form with some congregational aspects, and that the decision of the church hierarchy are binding. The Synod admits to

being "generally congregational" with respect to the ownership of property of the local churches, but distinguishes the present situation involving the Grace property because of the option clause which the Synod claims makes the relationship between Grace and itself hierarchical. (D's memo, p. 42)

Due to this substantial controversy over the nature of the Church's polity, identification of the governing body for the purpose of enforcing its decision is impossible without an unconstitutional inquiry into the customs, rules and practices of the Synod. Justice Brennan in a case involving a similar polity dispute stated the rule that:

"... where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy."

MD & VA Churches, 396 U.S. at 369-70 (J. Brennan concurring). This court is thus prohibited from resolving the polity dispute in this case by examining the Synod's laws and practices. Such an action would require "a searching and therefore impermissible inquiry into church polity". *Serbian Orthodox Diocese*, 426 U.S. at 723. Without a readily ascertainable governing body to defer to this court has no choice but to refrain from taking any action involving the property.

In view of the limited role which the Supreme Court has ordained that civil courts must play in church property disputes and in light of the principles of the first amendment, this court believes that it would be improper for it to decide to enforce or, for that matter rescind the agreement in dispute.

With respect to intervenors evidence of alleged irregularities and claims made because of them, this court is of the opinion that it cannot as a matter of law inquire into such matters in this case at this time for two reasons.

First, the alleged irregularities are not of such magnitude as to authorize a court to retract the 1977 decision of Grace to disaffiliate from Synod.

Second, basic principles of law preclude a court from interfering in actions taken by any private organization absent fraud or violation of constitutional or legal rights.

Accordingly the court denies the motions for summary judgment of defendants and intervenors.

With respect to plaintiff Grace, the court denies its motion for summary judgment insofar as it seeks a determination of the polity of the Synod or affirmation that its 1977 decision to disaffiliate did not trigger the option contained in the 1929 agreement between Grace and Synod.

All that this court can and will do is declare (1) that the 1929 agreement is valid and legally binding on the parties; (2) that the provisions of 1 C of the 1929 option is unenforceable in a civil court as applied to the undisputed facts presented by the motions for summary judgment.

**APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST DISTRICT**

**FROM THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

**GRACE EVANGELICAL LUTHERAN
CHURCH OF RIVER FOREST, ILLINOIS, an
Illinois religious corporation,**
Plaintiff-Appellee,

v.

**THE LUTHERAN CHURCH-MISSOURI
SYNOD, a Missouri not-for-profit corporation
and CONCORDIA TEACHERS COLLEGE, an
Illinois not-for-profit corporation,**
Defendants-Appellants.

**WILBUR WERLING, LOREN SAAR, HENRY
EICHEMBERG and CARL DREISSNACK, in-
dividually on their own behalf as voting
members of Grace Luthern Church of River
Forest, Illinois, and on behalf of all similarly
situated voting members of Grace Evangelical
Lutheran Church of River Forest, Illinois, and
derivatively on behalf of Grace Lutheran
Evangelical Church of River Forest, Illinois,**
Intervenors-Appellants,

v.

**GRACE EVANGELICAL LUTHERAN
CHURCH OF RIVER FOREST, ILLINOIS, an
Illinois religious corporation.**

No. 77 L 21001

NOTICE OF APPEAL

| | |
|-------------------------|-------------------------|
| To: James A. Seritella | Wesley S. Walton |
| Reuben & Proctor | Ward Meythaler |
| 11 South LaSalle Street | 8300 Sears Tower |
| Chicago, Illinois 60603 | Chicago, Illinois 60606 |

Intervenors, Wilber Werling, Loren Saar, Henry Eichelberg, and Carl Dreissnack, individually and in their representative capacities, by their attorneys, Joyce and

Kubasiak, P.C., hereby appeal to the Appellate Court of Illinois, First Judicial District, Chicago, Illinois, from:

(A) the following portions of the Final Judgment Order entered on June 29, 1981:

(1) Paragraph 3 of the Final Judgment Order to the extent that it orders that plaintiff's Motion for Summary Judgment and the relief requested in plaintiff's Complaint are granted; and

(2) Paragraph 5 of the Final Judgment Order which states:

"Plaintiff's Motion for Summary Judgment on Intervenor's Complaint is granted and Intervenor's Complaint is dismissed. Intervenor's Motion To Reconsider And Adopt The Findings And Decision Of The Synodical District Commission is denied."

(B) the order entered on November 20, 1979 denying Intervenor-Appellants' Motion To Adopt The Findings And Decision of the Synodical District Commission.

Intervenor-Appellants respectfully request the Appellate Court to reverse the November 20, 1979, Order and the aforesaid portions of the Final Judgment Order entered on June 29, 1981, and to enter judgment on Intervenor-Appellants' Motion To Adopt the Findings and Decision of the Synodical District Commission in favor of Intervenor-Appellants, or, in the alternative, Intervenor-Appellants respectfully request the Appellate Court to reverse the November 20, 1979, Order and the aforesaid portions of the

June 29, 1981, Final Judgment Order and remand this cause for further hearing or trial.

One of the Attorneys for Intervenors.

JOYCE AND KUBASIAK, P.C.
77 West Washington Street
Chicago, Illinois 60602
726-3360

Of Counsel:

EDWARD T. JOYCE
RICHARD S. REIZEN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GRACE EVANGELICAL
LUTHERAN CHURCH
OF RIVER FOREST, ILLINOIS,
an Illinois Religious Corporation,
Plaintiff,

vs.

THE LUTHERAN CHURCH-
MISSOURI SYNOD, a Missouri
not-for-profit corporation and
CONCORDIA TEACHERS
COLLEGE, an Illinois
not-for-profit corporation,
Defendants.

No. 77 L 21002

AFFIDAVIT

The undersigned, Dr. Herbert Mueller, being duly sworn upon his oath, states as follows:

1. He is the duly elected and qualified Secretary of The Lutheran Church-Missouri Synod.

2. The Secretary of the Synod is by virtue of that office a member and the secretary of the Synod's Commission on Constitutional Matters. According to the Synod's bylaws, its Commission on Constitutional Matters "shall interpret the Synod's Constitution, Bylaws and resolution, ..." and its opinion "shall be binding on the question decided unless and until it is overruled by a synodical convention." (Bylaw 2.107(e).) Although he is not herewith expressing an opinion of the Commission on Constitutional Matters, the Secretary has noted his position on that Commission in order to establish that he is well acquainted with the Synod's structure

and polity, as identified in its Constitution and the Bylaws thereto.

3. The Synod has established and maintained for many years a system of adjudication and appeal applicable to "cases of disagreement, accusation or controversy in which all parties are within the following: The Synod, Districts of the Synod, organizations owned and controlled by the Synod, persons holding positions with any of the foregoing, or members of the Synod." (Bylaw 5.01.) In that context, "members of the Synod" means member congregations and pastors and teachers who are on the official rosters of the Synod.

4. Although the Synod recognizes in its polity considerable self-government by local congregations, its procedures of adjudication and appeal are regarded by it as binding on those individuals and organizations which form a part of the Synod or are associated with it by their voluntary action. Simply stated, the Synod regards its member congregations as having voluntarily relinquished a portion of their autonomy by associating with other member congregations within the Synod, especially in doctrinal matters, in procedures involving the adjudication and appeal of doctrinal issues, and in its own rules, regulations, custom, and polity. In this respect the Synod regards itself as having "hierarchical" character, as that has been articulated by some civil courts.

5. The importance of the Synod's maintaining its ability to effectively handle matters of controversy through its procedures of adjudication and appeal lies in its need to carry out its constitutional object to protect its members "in the performance of their duties and the maintenance of their rights." (Constitution Article III, 8.) This adjudicatory process is available to protect all, even those who may be in a minority position.

HERBERT MUELLER

Dr. Herbert Mueller

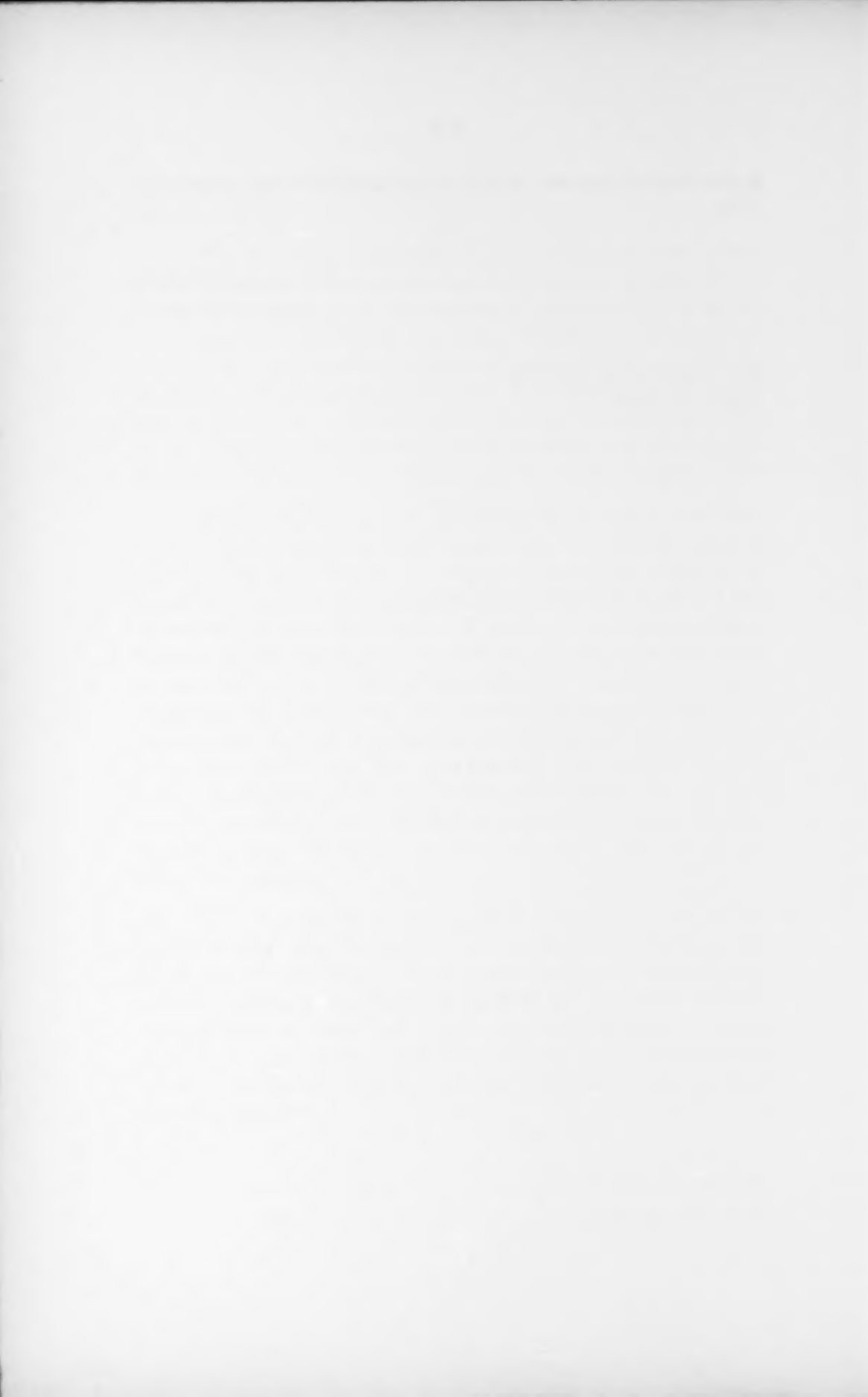
F-3

Subscribed and sworn to before me this 25th day of October,
1979.

BETTY J. POWERS

Notary Public

My commission expires:
April 22, 1980



Resolved, That workers in the categories to be developed be granted the privilege of receiving services and supervision rendered by the office of the District president.

Subject: To Reaffirm Essential Congregational Polity of the Synod

RESOLUTION 5-10A

Report 4-03 (CW, pp. 126-127); Overtures 5-72A—5-75 (CW, pp. 231-233)

WHEREAS, A number of congregations have offered overtures addressing the question of how best to reaffirm congregational relationships within The Lutheran Church—Missouri Synod; and

WHEREAS, An accurate perception of the situation recognizes that the questions now before the convention arise out of a conflict between ecclesiastical concepts and civil law concepts used in the adjudication by courts of disputes between or within churches; and

WHEREAS, The word “hierarchical” is repugnant to Missouri Synod Lutherans because etymologically it refers to “rule by the priesthood”; and

WHEREAS, Civil courts have given the word “hierarchical” a meaning that is different from the one given in theology, to distinguish between forms of church governments which are entirely congregational and those forms which involve associational relationships and commitments (and are therefore designated as having at least “hierarchical” dimensions); and

WHEREAS, In past instances the Synod has utilized the legal nomenclature “hierarchical” in legal proceedings in order to preserve to member congregations and others who associate together within the Synod the right to resolve disputes freely in accordance with established synodical procedures; and

WHEREAS, There are currently two methods by which courts can constitutionally decide church disputes, the "neutral principles of law" method (where the deeds and other documents that relate to the issues will be applied literally, with no application of underlying motivation or intention as to matters that are or may be religious in nature), and the "deference" method (where, at least as to issues which necessarily involve theology or doctrine, the courts will defer to the decision of an appropriate body within the church organization if the church organization has a structure and procedure that it holds out as capable of use in resolving disputes); and

WHEREAS, The nature of the polity of a church body in the eyes of civil law is determined by an examination of the church's formal structure and operations; therefore be it

Resolved, That The Lutheran Church—Missouri Synod reaffirms that its synodical polity is essentially and principally congregational in nature and therefore is ordinarily referred to as a congregational polity; and be it further

Resolved, That the Synod acknowledges that under the definition and application of the word "hierarchical" in civil law there are aspects in the relationships within the Synod between and among congregations (e.g., Article II, Confession; the calling of certified and endorsed pastors only; agreements to abide by adjudicatory procedures and their final determinations) which under civil law may imply, express, or evidence what the courts regard as hierarchical dimensions; and be it further

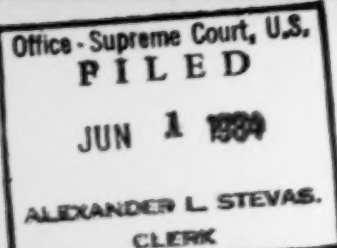
Resolved, That, believing that Scripture (1 Cor. 6) requires that we make every effort to avoid disputes or to resolve them internally when they do arise, of the two constitutional methods for resolving church disputes by the civil courts, the Synod favors the "neutral principles of law" method whenever it can be applied, and that when neutral principles cannot be applied to resolve a particular controversy, the

Synod declares that it is able and willing to resolve disputes internally; and be it further

Resolved, That while we believe that the courts should recognize that there are church polities other than "congregational" and "hierarchical," unless and until courts do so, the present status of case law compels us to use certain legal terminology; and be it finally

Resolved, That with the previously outlined explanation, the Synod declares itself as satisfied with the procedures heretofore followed by the Synod in instances involving these issues.

(2)
No. 83-1771



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR WERLING, CARL DRIESSNAK, LOREN SAAR,
and HENRY EICKELBERG, individually, and on behalf of
all similarly situated voting members of GRACE EVAN-
GELICAL LUTHERAN CHURCH OF RIVER FOREST,
ILLINOIS,

Petitioners,

vs.

GRACE EVANGELICAL LUTHERAN CHURCH OF RIV-
ER FOREST, ILLINOIS, an Illinois religious corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Illinois Appellate Court correctly held that a civil court is prohibited by the First Amendment from deciding a disputed issue of church government.

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IN THE
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vs.

GRACE EVANGELICAL LUTHERAN CHURCH OF RIV-
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

BRIEF FOR RESPONDENT

STATEMENT

A. Nature of the Dispute

The principal parties to this dispute were Plaintiff Grace Evangelical Lutheran Church ("Grace")¹ and Defendants the Lutheran Church-Missouri Synod and its Concordia Teachers College ("Synod"). (App. A.)² Those parties, the only church bodies involved, each lost different portions of the appeal and decided to seek no further review by either the Illinois Supreme Court or this Court. (App. B.) The issues concerning those parties, including issues concerning the 1929 option, are no longer a part of this case.

¹ Grace is an independent congregation and has no parent corporations, subsidiaries or affiliates.

² Cites to "App." are to Petitioners' Appendix.

Petitioners, intervenors below, were four members of Grace who voted against withdrawal from the Synod and claimed a right to Grace's property under Article XV of Grace's constitution which reads:

If at any time a schism should take place in the congregation which God may graciously prevent, the property of the congregation and all benefits connected therewith shall remain with those members who shall adhere to the unalterable articles of this constitution.

The four Petitioners contended the vote by the majority of Grace's members to withdraw from the Synod created a schism and they (and not the overwhelming majority of the members of Grace) were the members who were conforming to the "unalterable articles" (all doctrinal provisions) of Grace's constitution.³

After Grace had withdrawn from the Synod and during the pendency of this case, Petitioners took their claim to the Synod's Northern Illinois District Commission of Adjudication. That Commission, according to the Synod's own bylaws, cannot make binding decisions that "affect the self-governing rights of the congregations." (Synod's Bylaw 5.39.) Without Grace's participation, the Commission issued a decision declaring Petitioners entitled to the protection of Article XV. (App. D.) The Synod itself then stripped that decision of any possible effect by arguing it was entitled to Grace's property despite any claim made by Petitioners. (App. A at 12.) Petitioners, nevertheless, continue to assert that the Commission's decision is somehow sanctioned by the Synod and binding on a civil court. Three Illinois Courts—the trial, appellate, and, in denying leave to appeal, the supreme court—rejected this claim and there is no reason for this Court to grant discretionary review merely to

³ The majority members were accused of violating Article II of Grace's constitution, which is entitled "Confession" and requires the congregation to follow the Holy Scriptures and the Symbolical Books of the Evangelical Lutheran church.

reject this claim once again or reaffirm that the result was reached under settled constitutional principles.

B. The Polity Issue

In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court held that States may adopt their own rules for deciding church property disputes as long as those rules are consistent with First Amendment principles which prohibit civil courts from becoming entangled in issues of religious doctrine, practice, or government. One method approved by this Court is the polity analysis under which a court defers resolution of doctrinal issues to the highest ecclesiastical tribunal with the power to determine them and then enforces property rights in accordance with those decisions. *Watson v. Jones*, 80 U.S. 679, 724-25 (1871). Though the Illinois courts have traditionally applied that approach, the appellate court found that the polity analysis could not be applied here because the polity of the Synod was itself a matter of significant dispute. (App. at 13.)

Grace presented an abundance of evidence including Article VII of the Synod's constitution (App. A at 14); the Synod's bylaws; Grace's constitution; admissions of the Synod; books, articles and speeches of the Synod; scholarly treatises; and histories of the Synod which all agreed that from its founding in the 1840's until this dispute, the Synod had declared and all (including the United States Government) had believed that "[i]n polity the Missouri Synod is *pronouncedly congregational*." *Religious Bodies*, Vol. II, Part 2, p. 925 (U.S. Dept. of Commerce 1936) (emphasis added). In other words, in any matters concerning a congregation, the congregation is the "highest tribunal" for determining the dispute. E.g., C. Mundinger, *Government in the Missouri Synod* 196 (1947) (App. A at 14). The Synod cannot resolve such disputes because:

In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body.

(Synod Constitution, Art. VII (App. A at 14).)

To contradict that evidence, and create the dispute over polity, Petitioners presented the affidavit of Dr. Herbert Mueller, a vice-president of the Synod, who said the Synod had "hierarchical character," though it was basically congregational. (App. F.)⁴

The appellate court found that the polity approach was unusable because the First Amendment prohibited it from resolving the dispute over the Synod's polity. The court also found that the "neutral principles of law" analysis could not be used since Petitioner's claim depended solely on the resolution of doctrinal issues. As a result, the appellate court affirmed the trial court's finding that the parties simply had to be left as they were before this action was filed. (App. E.)

REASONS FOR DENYING WRIT

I.

The Appellate Court's Decision Is Fully In Accord With The Decisions Of This Court.

As this Court has often declared, civil courts are prohibited from resolving disputes over "theological controversy, church discipline, ecclesiastical government, or the conformity of the

⁴ In their brief, Petitioners also rely on Resolution 5-10A (Petition at 12) and attach that resolution as an Appendix (App. G). That resolution, passed in 1983, two years after the trial court decided this case, has never been a part of the record and thus Petitioners' attempt to use it here is impermissible. Petitioners have recently filed a new action in the Circuit Court of Cook County, Illinois, No. 83 L 53171, raising the effect of that resolution on the trial court's judgment in this case.

members of the church to the standards of morals required of them." *E.g., Serbian Eastern Orthodox Diocese v. Milojevich*, 426 U.S. 596, 714 (1976). The appellate court's decision simply heeds that command. Petitioners' claim under Article XV of Grace's constitution depended on the resolution of the issue of "the conformity of the members of the church to the standards of morals required of them." Prohibited from deciding that doctrinal issue, the appellate court attempted to apply the polity analysis first recognized in *Watson v. Jones*, 80 U.S. 679, 724-25 (1871). However, the court was then faced with an issue of "ecclesiastical government," *i.e.*, whether Grace or the Synod was the proper church body for resolving doctrinal issues, which it also could not decide because, as declared by this Court:

[W]here the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the [polity] approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369-70 (1970) (Brennan, J., concurring); *accord, Jones v. Wolf*, 443 U.S. 595, 605 (1979).

Unable to use the polity approach, the court considered neutral principles of law. *Jones v. Wolf*, 443 U.S. 595 (1979). However, that approach could not aid the Petitioners since their claim to the property depended solely on the resolution of religious issues, leaving the court with no choice but to declare it could not civilly enforce the alleged rights of the Petitioners.

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

In essence, the appellate court decided no religious issues and no new federal questions but simply applied well-settled law to the particular facts of this case.

II.

The Present Status of This Case Mandates Against Discretionary Review

Grace firmly believes that the Synod's polity is congregational and that the courts below should have deferred resolution of any doctrinal issues to it. In fact, the only other appellate courts that have directly ruled on the issue have held the Synod to be congregational in polity. *Peace Evangelical Lutheran Church v. Gerberding*, ____ N.W.2d ____ (Mich. App., Docket No. 63878, June 27, 1983) (attached as an Appendix) (rejecting a claim by minority members of a congregation under identical facts to this case); *Mertz v. Schaffer*, 271 S.W.2d 238, 241 (Mo. App. 1954). However, after the appellate court's ruling, Grace, the Synod, and Concordia College, the principal disputants and only church bodies involved, though all unsatisfied to some degree with the outcome, all determined not to pursue this case any further.

None of the church bodies has a dispute to present to this Court. The major dispute concerning the 1929 option is now over. Review of Petitioners' claim would simply be the review of a collateral matter in this case without the principal players. This Court should not grant review to decide issues relating to the Synod when that body has now purposefully removed itself from these proceedings.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Filed June 27, 1983

STATE OF MICHIGAN

Court of Appeals

Peace Evangelical Lutheran Church
of Southgate, Michigan, a Michigan
Corporation, Lawrence A. Brown,
Dan Cojocar, Patsy Sirianni, Esther
L. Fink and Edward Klopp,

Plaintiffs-Appellants,

v.

No. 63878

Dr. Keith Gerberding, Dennis M.
Bux, Stanley Pritchett, George Mill-
er, Jack Richter, Ruth Gierke, Ar-
nold Voss, Glenn DeFeyter, Theo-
dore Jacob, Norman Kaminski,
Milton Rehbein, Walter Evans,
Robert Gnadt, Howard Thomas,
Richard Ebendick, Albert Hichson,
John Balger, Sr., Stanley Stull,
Linda Bunte, Arthur Weiss, Ken-
neth Gierke, and Donald Morton,

Defendants-Appellees.

BEFORE M.H. Wahls, P.J., R.S. Gribbs and
M. Warshawsky*, JJ.

PER CURIAM

This case involves a church property dispute between two factions of the Peace Evangelical Lutheran Church of Southgate, Michigan. Plaintiffs, who represent the minority of the congregation, instituted this action against defendants, who represent the majority, seeking return of the church property to

* Circuit Judge, sitting on the Court of Appeals by assignment.

their control and possession. The trial court granted defendants' motion for summary judgment on the ground that there was no genuine issue as to material fact and defendants were entitled to judgment as a matter of law, GCR 1963, 117.2(3). Plaintiffs appeal as of right.

The material facts relevant to this dispute were stipulated to by the parties below. Peace Evangelical Lutheran Church of Southgate, Michigan, as it is presently known, was incorporated under the laws of the State of Michigan in 1947. A church constitution providing that the congregation would affiliate with the Lutheran Church—Missouri Synod, and by-laws were adopted. The local constitution and by-laws were submitted to the Missouri Synod for approval pursuant to Article VI, Section 5 of the Constitution of the Lutheran Church—Missouri Synod.

Articles VIII and XII of the Synod Constitution and Article I of the Synod By-Laws describe the organizational structure of the Lutheran Church—Missouri Synod. The Synod is composed of Districts based on geographical area. Several circuits compose a district. The national administration is based in St. Louis, Missouri. Every two years, a national convention is held where proposed resolution are debated and voted on. Each circuit selects one lay representative and one Pastor as representatives to the national convention.

During the 1970's, many controversies arose within the Lutheran Church—Missouri Synod. In 1979 some members of the congregation proposed amending the local church's constitution so as to permit the congregation to voluntarily withdraw from the Missouri Synod and affiliate with the English Synod of the Association of Evangelical Lutheran Churches (AELC), an organization wholly separate from and unaffiliated with the Lutheran Church—Missouri Synod (At the present time, the AELC has over 200 member congregations, virtually all of which were formerly associated with the Lutheran Church—Missouri Synod).

The proposed amendments were adopted on May 21, 1979 by a majority vote of the voters assembly, 147 in favor and 29 opposed. The parties stipulated that, procedurally, the vote was correctly executed. The majority faction of the congregation subsequently withdrew from the Missouri Synod and affiliated with the Association of Evangelical Lutheran Churches.

While the proposed amendments were still being debated, and before the vote, certain members of the minority contacted the Commission of Adjudication of the Michigan District of the Lutheran Church—Missouri Synod regarding the proposed amendments. Four months after the amendments were approved, the commission rendered a decision in favor of plaintiffs, the minority.

The Commission found that the action taken by defendants was illegal according to Article (V) (E) (2) of the local church's constitution as it existed prior to the 1979 amendments. Article (V) (E) (1) and (2) provided:

- “1. The congregation as a body owns all church property and the property of the various organizations of the congregation,
- “2. And should at any time, a separation take place in this congregation on account of doctrine, the property of the congregation and all the benefits connected therewith shall remain with those members through [sic] a minority, who shall continue to adhere to the doctrines tenets and practices which prevailed when this Constitution was adopted.”

The Commission found that the action taken by defendants was because of a dispute among the members of the congregation over doctrinal issues. Therefore, it was the opinion of the Commission that the minority group, plaintiffs, who wished to remain with the Lutheran Church—Missouri Synod had the right to control and possession of all the church property.

As a group, the individual plaintiffs, along with those others who ceased active association with the congregation after May 21, 1979, contacted the Michigan District of the Missouri Synod and requested reinstatement as a congregation. This request was granted. After being recognized by the Lutheran Church - Missouri Synod as the legitimate representative body of Peace Evangelical Lutheran Church, and with the decision of the Adjudication Commission in hand, some of the individual plaintiffs wrote a letter to defendants dated October 19, 1979, in which they demanded the church property. The congregational majority did not respond to this demand. Consequently this lawsuit was filed.

Recently, in *Bennison v Sharp*, ____ Mich App ____; ____ NW2d ____ (Docket No. 58097, *rel'd*, 12/6/82), *this Court reviewed the limitations placed by the First Amendment upon judicial resolution of church property disputes. As noted in Bennison, supra*, the United States Supreme Court has expressly approved of two methods by which civil courts may be guided in such matters: 1) the polity or hierarchical theory, pursuant to which questions concerning the rights to property held by religious bodies are resolved according to whether the church involved is congregational or hierarchical; and 2) the neutral principles of law theory, whereby traditional principles of civil property law are applied with reference to the language of the deeds, the terms of local church charters, state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. See *Jones v Wolf*, 443 US 595; 99 S Ct 3020; 61 L Ed 2 775 (1979), *Watson v Jones*, 13 Wall 679; 80 US 679; 20 L Ed 2d 666 (1872). "Indeed 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" *Jones v Wolf*, 443 US at 602, quoting *Maryland & Virginia Eldership of the Churches of God v Church of God at Sharpsburg*, 396 US 367, 368; 90 S Ct 499; 24 L Ed 2d 582 (1970) (Brennan J., concurring) (Emphasis in original).

The trial court in this case, in a scholarly opinion, utilized the first method. Concluding that Peace Evangelical Lutheran Church was of congregational polity, the trial court applied "the ordinary principles which govern voluntary associations," and determined that the church property remained under the legal control of the majority of the congregation represented here by defendants. See *Bennison v. Sharp, supra*, slip op. at 5.

Plaintiffs on appeal assert that the trial court erred in determining that the church was entirely congregational. They argue that the court failed to recognize the hierarchical aspect of the Missouri Synod on doctrine and erred in refusing to defer to the decision of the Michigan District Commission of Adjudication.

We agree with the trial court that perusal of the Constitutions and by-laws of the congregation and the Lutheran Church-Missouri Synod establishes that the Peace Evangelical Lutheran Church is congregational, a religious body "which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." *Bennison v. Sharp, supra*, quoting *Watson v. Jones*, 80 US at 722-723.

Article V of the local church's constitution clearly reserves to the congregation the ultimate decision-making authority with respect to its own affairs:

"The congregation through the voting members shall have the supreme power in the spiritual and material *administration* and *management* of its own ecclesiastical and congregational affairs. . . ." (emphasis added).

Both the constitution and the by-laws of the Missouri Synod recognize the local congregation's right to self-government, and that the Synod functions solely as an advisory body to the congregation. Article VII of the Constitution provides:

"In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is not an advisory body. Accordingly, no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God or if it appears to be inexpedient as far as the condition of a congregation is concerned."

Section 1.09 of the By-laws provides:

b. The Synod expects every member congregation to respect its resolutions and to consider them of binding force if they are in accordance with the Word of God and if they appear expedient as far as the condition of the congregation is concerned. *The Synod, being an advisory body, recognizes the right of the congregation to be the judge of the expediency of the resolution as applied to its local condition.* However, in exercising such judgment, a congregation must not act arbitrarily but in accordance with the principles of Christian love and charity.

"c. Membership of a congregation in the Synod gives the Synod no equity in the property of the congregation." (Emphasis added.)

No provision in the local or general church's constitution or by-laws grants to the Synod or its Commission of Adjudication the power to issue a decision, binding on Peace Evangelical Lutheran Church, regarding application of Article V (E)(2). The Commission's decision is at most advisory, given the absence of such a provision and the clearly congregational nature of the church itself.

The trial court determined, quite correctly, that application of "neutral principles of law" was not permissible in this case. Judicial enforcement of Article V (E)(2) would necessitate a determination by the court of whether the dispute here was on account of doctrine and, if so, which faction continues to adhere to the doctrines, tenets and practices which prevailed when the

constitution was adopted. A civil court is prohibited by the First Amendment from resolving church property disputes on the basis of religious doctrine or practice. *Bennison, supra*. As application of Article V (E) is conditioned upon a finding of departure of doctrine, it may not be civilly enforced. See *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 US 367, 370; 90 S Ct 499; 34 L Ed 2d 585 (1970) (Brennan, J., concurring).

Affirmed.

/s/ M. H. WAHLS

/s/ R. S. GRIBBS

/s/ M. WARSHAWSKY